SUPREME COURT, U. S.
MAY 16 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. [redacted] 1149

SANFORD E. ADAY, WALLACE DEORTEGA MAXEY, and WEST COAST NEWS COMPANY, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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SANFORD E. ADAY, WALLACE DEORTEGA MAXEY, and WEST COAST NEWS COMPANY, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on March 22, 1966, and amended on April 21, 1966.

Opinions Below.

The opinion of the Court of Appeals [R. 7], printed in Appendix A hereto, is unreported. The opinion of the District Court (Honorable Raymond W. Starr) (42a-62a)[1] is reported in 30 F.R.D.13. The opinions of the

[1]The reference "42a-62a" is to petitioners' Appendix Record on Appeal used in the court below and a part of the certified record filed with the petition herein. The said Appendix is in four volumes consecutively numbered, with the small "a" always appear-

District Court (Honorable Noel P. Fox) (97a-123a, 698a-760a) are reported in 216 F. Supp. 911 and 228 F. Supp. 171, respectively. The opinion of the Court of Appeals in mandamus proceedings prior to trial, printed in Appendix B hereto, is reported in 318 F. 2d 588, cert. den., 375 U.S. 832.

Jurisdiction.

The judgments of the Court of Appeals, printed in Appendices C, D, E and F hereto, were entered on March 22, 1966 [R. 3-6].[2] The order of the Court of Appeals authorizing the District Court to reduce the sentences imposed, printed in Appendix G hereto, was entered on April 5, 1966 [R. 8]. The order of the District Court amending the judgments of conviction and reducing sentences, printed in Appendix H hereto, was entered on April 6, 1966 [R. 9-11]. The order of the Court of Appeals approving the reductions of sentences and affirming the judgments of conviction, as amended, printed in Appendix I hereto, was entered on April 21, 1966.

By order of Mr. Justice Stewart, dated April 14, 1966, the time to file this petition for a writ of certiorari was extended to and including May 21, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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ing after the page number. Nine additional copies of the entire Appendix Record and the book herein involved, are also being filed for the convenience of the Court. Rule 21(4); 23(i).

[2]The District Court entered separate judgments of conviction for each of the petitioners (761a-763a, 764a-766a, and 767a). Petitioner Aday also prosecuted an appeal (13a) from an order of the District Court denying a motion for reduction of bail pending appeal (768a). The Court of Appeals entered four separate judgments of affirmance [R. 3-6].

Questions Presented.

The indictment returned against petitioners was one of the first to be brought under 18 U.S.C. 1461 and 1462, as amended in 1958 (August 28, 1958, Pub. L. 85-796, §§ 1, 12 Stat. 962), permitting multiple venue prosecutions and forum-picking by federal prosecutors. Pretrial motions, including motions for transfer of proceedings in the interest of justice, to dismiss the indictment, challenging the grand jury array, for a bill of particulars, all made pursuant to applicable provisions of the Federal Rules of Criminal Procedure, were denied, or dismissed for reasons which appear contrary to law and the Constitution.

The case was tried and submitted to the jury without proof of the essential ingredients of the offense. All comparison evidence offered by petitioners to demonstrate that the writing was not obscene and the absence of *scienter* on the part of petitioners was excluded by the trial court, upheld by the court below.

Not only does the uncontradicted record show that the book *Sex Life of a Cop* is entitled to constitutional protection, but in a constitutional sense the book is not obscene. The instructions of the trial court and the refusal to instruct appear to have misconceived and failed to apply the standards enunciated by this Court or judging issues of obscenity and *scienter*.

The mailing and shipment of a single book to establishments in the judicial district were held by the courts below to constitute separate offenses upon which maximum punishments could be inflicted. The jury verdict of guilty in Grand Rapids, Michigan with respect to the one book, *Sex Life of a Cop*, resulted in a sentence of

25 years' imprisonment for one petitioner, and 15 years' imprisonment for another petitioner, together with fines of $25,000 for one petitioner, $19,000 for another petitioner and $25,000 for a third petitioner. In total, the sentences imposed were 40 years' imprisonment and fines of $69,000. The immediate sequestration and restraints upon petitioners' business and funds and the cash bail of $85,000 for petitioners pending appeal are indicative of the atmosphere which permeated the courtroom in Grand Rapids.

The Court of Appeals, without passing upon the grave constitutional questions raised by the harsh punishments imposed upon petitioners, urged the District Judge to exercise a more "discreet" authority. It urged the District Court to put a top limit of 10 years upon the sentence of one petitioner, and something less for the other petitioner, while leaving the fines intact. The District Judge responded by leaving the fines of $69,000 intact, and imposing a sentence of 10 years' imprisonment upon one petitioner and 5 years' imprisonment upon the other, all of which was thereupon affirmed by the Court of Appeals.

The questions presented as a result of all the aforesaid are:

1. Whether, in the light of the provisions of the First, Fifth and Sixth Amendments, the instructions of the trial court, and the refusals to instruct, upheld by the Court of Appeals, rendered the federal obscenity statutes, 18 U.S.C. 1461 and 1462, as amended, unconstitutional, arbitrarily deprived petitioners of a fair trial and their liberties and property without due process of law, abridged petitioners' exercise of freedoms of

speech and press and vitiated the judgments of conviction, because:

(a) the trial court instructed the jury that the Government was required to prove only that each of the petitioners "knew the contents of the book";

(b) the trial court refused to instruct the jury that the Government was required to prove that each of the petitioners knew that the book was obscene;

(c) the trial court refused to instruct the jury that if the jury found that petitioners were honestly ignorant of the alleged obscenity of the book, then petitioners were entitled to an acquittal;

(d) the trial court refused to instruct the jury that the book could not be held to be obscene unless utterly without redeeming social importance, that the alleged pruriency of the book could not be balanced against the social importance of the material and that the presence of matters of social importance in the book gained for the book its position as constitutionally protected material;

(e) the trial court, without prior notice to petitioners, either in the indictment or throughout the trial, instructed the jury that the federal obscenity statutes authorized convictions of petitioners, either for the dissemination of a "filthy" book or the dissemination of an "obscene, lewd and lascivious" book, and defined the term "filthy" as that "sort of treatment of sexual matters in such a vulgar and revolting way that it tends to rouse a feeling of disgust and revulsion";

(f) the trial court arbitrarily and erroneously instructed the jury with respect to the meaning of

the words "obscene, lewd and lascivious", and instructed the jury in a manner similar to the *Hicklin* instructions, rejected by this Court as unconstitutionally restrictive; and

(g) the trial court refused to instruct the jury that the Government was required to prove that petitioners specifically intended to appeal to the prurient interest of the readers of the book; refused to give instructions requested by petitioners which were intended to limit the broad, ambiguous and conflicting instructions of the trial court, and arbitrarily refused to charge and disparaged petitioners' theory of the case, while stressing the Government's theory of the case.

2. Whether the judgments of conviction under the federal obscenity statutes and indictment herein, which rest on no evidence other than the book itself to establish the alleged obscenity of the writing or the alleged unlawful knowledge of petitioners, deprived these petitioners of a fair trial, of their liberties and property without due process of law and abridged petitioners' freedoms of speech and press contrary to the provisions of the First, Fifth and Sixth Amendments.

3. Whether the exclusion by the trial court, upheld by the Court of Appeals, of oral and documentary testimony offered by petitioners to establish the non-obscenity of the book and the absence of *scienter* on the part of petitioners, and the adverse rulings of the said courts with respect to constitutionally relevant comparison evidence and expert testimony offered by petitioners, deprived petitioners of a fair trial and their liberties and property without due process of law and abridged peti-

tioners' freedoms of speech and press, all contrary to the provisions of the First, Fifth and Sixth Amendments.

4. Whether the book *Sex Life of a Cop* by Oscar Peck is entitled to the protections of the free speech and press provisions of the First Amendment, and whether the federal obscenity statutes, 18 U.S.C. 1461 and 1462, as amended, as construed and applied to punish the mailing and shipment of the said book, render the statutes unconstitutional and arbitrarily deprive these petitioners of their liberties and property without due process of law and abridge petitioners' exercise of freedoms of speech and press, contrary to the provisions of the First and Fifth Amendments.

5. Whether the federal obscenity statutes, 18 U.S.C. 1461 and 1462, as amended by Congress in 1958, permitting the Government a multiple choice of venue in prosecutions involving the mailing and shipment of books and other media of communication, on their face and as construed and applied, violate the free speech and press, the due process and fair trial provisions of the First, Fifth and Sixth Amendments.

6. Whether the denial of petitioners' motion for a transfer of proceedings pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, upon the uncontradicted record herein which demonstrated an imperative requirement for change of venue in the interest of justice, deprived petitioners of a fair trial and their liberties and property without due process of law and abridged petitioners' exercise of freedoms of speech and press contrary to the provisions of the First, Fifth and Sixth Amendments.

7. Whether the refusal of the trial court to permit the book to be read in open court to the jury, upheld by the Court of Appeals, denied petitioners a public trial with resultant deprivation of petitioners' liberties and property without due process of law, a fair trial and the exercise of petitioners' freedoms of speech and press, all contrary to the provisions of the First, Fifth and Sixth Amendments.

8. Whether, contrary to the provisions of the Fifth and Sixth Amendments, the laws of the United States, 28 U.S.C. 1861-1871 and Rules 6 and 12 of the Federal Rules of Criminal Procedure, the trial court, upheld by the Court of Appeals, unlawfully struck petitioners' motion to dismiss the indictment based on the illegal selection and organization of the grand jury which returned the indictment, wrongfully abandoned the trial of the issues involved, and unlawfully refused to make an appropriate determination therein.

9. Whether the consecutive sentences of imprisonment and fines imposed upon petitioners by the trial court, upheld by the court below, thus permitting the multiplication of offenses and punishments for the dissemination of a single book, vitiates the judgments of conviction herein, arbitrarily deprive these petitioners of their liberties and property without due process of law and abridge the exercise of freedoms of speech and press, all contrary to the provisions of the First, Fifth and Sixth Amendments.

10. Whether the sentences of fines and imprisonment imposed upon these petitioners, the orders made after trial sequestering petitioners' property and the order requiring the furnishing of $75,000 cash bail pending appeal for petitioner Aday, constituted cruel and

unusual punishment and the imposition of excessive bail, as well as an inhibition upon the exercise of freedoms of speech and press, all contrary to law, the free speech and press provisions, the due process provisions and the cruel and unusual punishment and excessive bail provisions of the First, Fifth and Eighth Amendments.

Constitutional Provisions, Statutes, and Rules Involved.

The constitutional provisions involved are the First, Fifth, Sixth, Eighth, Ninth and Tenth Amendments; the statutory provisions involved are 18 U.S.C. 1461, as amended (June 25, 1948, c. 645, 62 Stat. 768; June 28, 1955, c. 190, §§1, 2, 69 Stat. 183; August 28, 1958, Pub. L. 85-796, §1, 72 Stat. 962), and 18 U.S.C. 1462, as amended (June 25, 1948, c. 645, 62 Stat. 768; May 27, 1950, c. 214, §1, 64 Stat. 194; August 28, 1958, Pub. L. 85-796, §2, 72 Stat. 962); and the pertinent provisions of Rules 6, 12 and 21(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., are printed in Appendix J hereto.

Statement of the Case.

A. The petitioners Aday and Maxey are long-time residents of the State of California (35a, 38a). The petitioner West Coast News Company, Inc. is a California corporation with its principal place of business in the City of Fresno, State of California (35a). The indictment herein (14a-27a) was returned against petitioners in Grand Rapids, Michigan in the United States District Court for the Western District of Michigan, Southern Division. The indictment was in 19 counts and charged petitioners with knowingly using the mails for delivery and with knowingly causing a common car-

rier to be used for carriage in interstate commerce from Fresno, California to establishments in the Western District of Michigan, Southern Division, certain named books alleged to be "obscene, lewd, lascivious and filthy" in violation of 18 U.S.C .1461 and 1462, as amended.

Although the indictment was in 19 counts, the books involved were only eight in number. The jury disagreed with respect to seven of the named books (592a), and agreement was reached only with respect to the book entitled *Sex Life of a Cop* (Counts 6, 10, 12, 13 and 14; 17a-18a, 20a, 21a-24a) upon which the judgments of conviction here are based. The five separate counts alleged the mailing and shipment of the book to retail establishments in the Western District of Michigan, Southern Division on specified days in August and September 1959.

Pursuant to the provisions of the Federal Rules of Criminal Procedure, Rule 21(b), petitioners moved for a transfer of the proceedings to the Southern District of California, Northern Division. The said motion was denied by the Honorable Raymond W. Starr, a Judge of the United States District Court for the Western District of Michigan, Southern Division (42a-62a). 30 F.R.D. 13.[3]

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[3]Following the decision of this Court in *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, petitioners renewed their motion for transfer of proceedings (63a-74a) before the Honorable Noel P. Fox, a Judge of the said District Court, who became the trial judge herein following the retirement of Judge Starr. The motion was denied by Judge Fox, the said Judge stating that the "original holding" (116a) of Judge Starr would be adhered to (115a-123a). 216 F. Supp. at 923-927. A motion for leave to file a petition for writ of mandamus to review the orders denying transfer of proceedings was denied by this Court without opinion on June 17, 1963. *Aday, et al. v. United States District Court, etc.,* 374 U.S. 823.

Following arraignment, petitioners filed motions to dismiss the indictment upon the grounds, among others, that each of the counts of the indictment failed to state an offense; and that the statutes, as amended, on their face and as construed and applied by the indictment, violated the constitutional rights of petitioners (75a-81a). In addition, there was a challenge to the grand jury array (82a-83a). Petitioners also moved for a bill of particulars (86a-92a).

The aforesaid motion of the petitioners to dismiss the indictment upon constitutional and legal grounds (75a-81a) was denied by the District Court because "disposed of by Roth v. United States" (111a-112a). 216 F. Supp. at 921.

With respect to petitioners' motion challenging the grand jury array, the said District Judge granted a motion of the Government to strike petitioners' motion upon the ground that petitioners had impliedly and expressly waived any objections to the array by failing to make their motion prior to the return of the indictment (99a-112a).[4] Petitioners' motion for a bill of particulars was denied in its entirety (112a-115a). 216 F. Supp. at 921-923.

B. The trial commenced on October 28, 1963 (196a) and continued thereafter until December 13, 1963 when the jury verdict was returned (10a, 592a).

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[4]Mandamus proceedings were thereafter instituted by petitioners in the Court of Appeals, seeking to vacate the order which had stricken petitioners' motion to dismiss the indictment insofar as the motion challenged the method of selection of the grand jury. The Court of Appeals dismissed the petition for a writ of mandamus, declining to decide the questions involved "at this juncture of the proceedings". *Aday, et al. v. United States District Court, etc.*, 318 F. 2d 588, 591 (1963). A petition for a writ of certiorari was denied by this Court (375 U.S. 832).

With respect to the alleged obscenity of the book, the Government relied solely on the writing itself [Ex. 28; 250a]. No testimony, oral or documentary, was offered on the Government's direct case to prove that the book substantially exceeded customary limits of candor in the description or depiction of sex, or appealed to prurient interest, or was utterly without social importance (230a-235a, 550a-551a); nor following the conclusion of petitioners' case did the Government offer any rebuttal testimony on this issue (533a).

The Government made no attempt to prove, and indeed specifically disclaimed any legal burden requiring it to prove, knowledge by petitioners that the book was obscene (234a).

Petitioners moved that the books be read to the jury in open court. The trial court initially ruled in favor of petitioners (201a, 224a-225a), but subsequently reconsidered its position (262a-273a). See also, 703a-713a; 228 F. Supp. 171, 175-179.

Petitioners, on their own behalf, sought to establish that the books, including the book involved herein, did not violate the federal statutes as charged in the indictment, that the said books were constitutionally protected, and that petitioners had no knowledge that the said books were obscene, lewd, indecent or filthy. To prove the absence of *scienter* and nonobscenity of the writings, petitioners offered oral and documentary testimony, a large portion of which was excluded by the trial court. Some of the trial court's rulings in the exclusion of evidence offered by petitioners may be found in the written opinion of the trial court (698a-760a, 713a-760a); 228 F. Supp. 171, 179-203.

The trial court turned aside every attempt by petitioners to introduce comparison evidence bearing on community standards (735a-744a). 228 F. Supp. 191-195. As a result of the rulings of the trial court, the testimony of various witnesses and documentary evidence offered by petitioners, as well as various offers of proof with respect thereto, were all excluded and rejected by the trial court (400a-410a, 414a-432a, 468a, 470a-472a, 474a, 477a-478a, 481a-483a, 494a, 608a-639a).

The trial court also promulgated restrictive rules with respect to the use of expert witnesses by petitioners (718a-735a). 228 F. Supp. at 182-191. The trial court held that no expert could mention to the jury the name of any other book in his testimony except the books named in the indictment (735a; 228 F. Supp. at 190-191), and throughout the trial, including summation to the jury, all witnesses and counsel were directed by the trial court not to mention the title of a single book, not even the names of publishers, except the challenged books. Offers of proof were required to be in writing or outside the presence of the jury, and testimony by petitioners' witnesses with respect to the comparability of various books with the named books, and their *voir dire* examinations on qualifications, were also required to be held out of the presence of the jury (237a-239a, 241a, 251a-259a, 261a-262a, 273a-280a, 282a-288a, 308a, 311a-312a, 325a-339a, 346a, 358a-396a, 398a, 400a-411a, 443a, 466a-467a, 469a-474a, 506a-523a, 541a-542a, 608a-639a).

Much of the aforesaid evidence which was excluded and rejected by the trial court was also offered to prove lack of any unlawful knowledge or intent on the part of

petitioners. Other attempts by cross-examination of the prosecution's witnesses, or by petitioners on their own case to prove absence of *scienter* were rejected (275a-276a, 282a-287a, 400a-409a, 416a-429a, 469a-473a, 477a-478a, 494a, 608a-639a).

Petitioners moved for judgments of acquittal at the close of the Government's case (287a-288a, 685a-689a). These motions for judgments of acquittal were renewed at the close of petitioners' case, and again renewed at the conclusion of the entire case, the Government having rested its case without rebuttal (532a-534a). All of the aforesaid motions were denied by the trial court.

C. The instructions of the trial court to the jury (542a-564a, 573a-592a), the objections to the trial court's instructions by petitioners (564a-573a, 577a-583a, 589a), petitioners' proposed instructions which were rejected (640a-669a), and the argument on requested instructions (483a-492a, 534a-540a) reflect the trial court's conception of the governing law and the applicability of the said law to petitioners.

1. The trial court instructed the jury that the burden was on the Government to prove that each of the petitioners "knew the contents of the book" (555a-556a). Petitioners requested the trial court to instruct the jury that the proof must show "that each of the defendants knew that the books here involved were obscene" (640a-641a, P.I. 9, 14[5]). The trial court was requested to instruct the jury that mere knowledge of the contents of a book "does not for that reason alone justify an inference that the defendants knew the books were obscene" (641a, P.I. 15; 642a, P.I. 20).

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[5]The reference "P.I." refers to petitioners' Proposed Instructions.

Petitioners also requested the trial court to instruct the jury as follows: "If you believe that the defendants were honestly ignorant of the 'obscenity' of the books, if you should find they were 'obscene', then the defendants should be acquitted" (642a, P.I. 19).

Petitioners also requested the trial court to instruct the jury that the offense proscribed by the statutes required proof of a "specific intent" to appeal to the prurient interest (641a, P.I. 12); that in every crime, "there must exist a union or joint operation of act and intent" (642a, P.I. 17); and that a "specific intent to appeal to prurient interest" cannot be inferred merely from discussion of sex, or merely from the act of editing writing or mailing of a book (641a, P.I. 13; 643a, P.I. 21). The trial court refused to give the aforesaid instructions (485a-486a), rejecting as a "fallacy" petitioners' claims with respect to the burden placed upon the Government to prove knowledge of obscenity, and petitioners' right to acquittal if the jury found that petitioners honestly were ignorant of the obscenity of the writing as alleged in the indictment (486a).[6]

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[6]Petitioners objected to the trial court's instructions on knowledge as follows:

> "On the area of knowledge in both regards, the defendants respectfully object to the charge given by the Court, first of all, the Court has instructed the jury that knowledge of content is sufficient under the law and has refused the defendants' instructions which have in effect said that if the defendants in good faith, believe the material not to be obscene, that is a defense. We believe that the law requires knowledge on the part of the defendants that the material is in fact obscene and therefore, we respectfully object to the Court's giving the instruction and object to the refusal of the Court to give the defendants' instructions on knowledge as set forth in the defendants' proposed instructions." (569a-570a).

2. Petitioners requested the trial court to instruct the jury as follows:

> "A writing may not be deemed obscene unless it is utterly without redeeming social importance. In other words, the Constitution protects all material relating to sex except that which is totally devoid of social importance. The word 'redeeming' in the context herein refers not to a balancing of the alleged pruriency against the social importance of the material, but rather to the presence of matters of social importance in the content which gains for the material its position as constitutionally protected utterance. The jury will therefore keep in mind that in addition to the standards for judging obscenity, heretofore defined, no writing can be found to be obscene unless the writing is also utterly without redeeming social importance as the Court has defined it. *Zeitlin v. Arnebergh,* 31 Cal. Rptr. 800." (664a, P.I. 103).

With respect to this crucial instruction, the trial court not only denied the request, but termed it "an incorrect statement of the law as to elements of the offense which is covered" (535a). The trial court looked upon this statement of the law as peculiar to California because of the legislation in that State, but the trial court insisted that the issue of social importance, or the fact that social importance could not be weighed against prurient interest, was "not an element of the definition itself" (535a).

3. The trial court also instructed the jury as follows:

> "What is meant by 'obscene, lewd, lascivious or filthy'?

"On this element of the charged crimes, *there are two concepts in the statute,* the first relates to the words 'obscene, lewd and lascivious'. . . .

* * *

" 'Filthy' as used here, must also relate to sexual matters. *It is distinguished from the term 'obscene'.* 'Filthy' pertains to that sort of treatment of sexual matters in such a vulgar and revolting way that it tends to rouse a feeling of disgust and revulsion." (557a-562a; emphasis added).

In this connection, it should be noted that as soon as the indictment was returned, petitioners moved the trial court for a bill of particulars (86a-92a) requesting, among other things, a statement as to whether the terms "obscene, lewd, lascivious, indecent and filthy", as alleged in the indictment, were intended to encompass "a single concept, to wit, 'obscenity', or whether each of the said words is intended to encompass different concepts" (87a). The Government opposed the request upon the ground that the Government was not required to state initially "its theory of this case" (93a). Petitioners' motion for a bill of particulars was denied *in toto* (95a-96a, 112a-115a).

At the very outset of the trial, counsel for petitioners submitted to the trial court that during the selection of the jury, the trial court had twice read the entire statute and that the jury might be misled since the only charge was that the books were "obscene" and that the use of terms like "filthy, lewd and lascivious" might tend to broaden the meaning of the charge in the indictment as far as the jury was concerned (223a-224a). The trial court stated that it would prepare an instruction for the

jury "before the books are read" (227½a). The Government's counsel inquired what would be the subject matter of the instructions. The trial court replied: "A definition of obscenity, as nearly precise as we can get a definition so they will know what they are looking for" (227½a). The Government declined to elect "as to whether they are going on obscenity or something more than obscenity" (228a). The Government pointed out that some counts of the indictment used the words "obscene, lewd and indecent"; other counts used "obscene, lewd, lascivious and filthy" (229a). Stated the Government: "It appears as though we are talking about a difference without a distinction" (229a). Counsel for petitioners stated:

> "All right, let me say this, that as I sit here now, I assume that all we have to defend against is the term 'obscene' " (229a).

The Government never thereafter specifically requested an instruction on "filthy". The trial court never advised petitioners as to what instructions it intended to give with respect to the term "filthy", nor did it advise petitioners that "filthy" would be defined as a term distinguished from "obscenity", or that the word "filthy", so distinguished from "obscenity", would be defined in terms of a tendency to rouse feelings of disgust and revulsion.[7]

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[7]After the instruction was given, the following objection was made by counsel for petitioners:

> "MR. FLEISHMAN: If the Court please, the defendants object to the instructions just given to the jury, first and perhaps foremost, the defendants object to giving the instruction on the term 'filthy'. This was not tendered by the Government, it was a matter that remained open from the first day of the trial. As I recall and as I had understood it, the term 'filthy' was not an issue in this case and for the

4. With respect to the meaning of the words "obscene, lewd and lascivious" as contained in the statutes, the trial court defined the terms, among other things, as "signifying that form of immorality as it relates to sexual and prurient, and has a tendency to arouse lustful thoughts"; tending "to arouse sexual impulses and lead to sexually impure thoughts"; the arousal of "sexual desires" (557a). The trial court instructed the jury that "the line dividing the salacious from literature, art, science, and legitimate entertainment or amusement, is not straight and unwavering"; that "contemporary community standards" means "the standards generally held throughout this country covering sex and matters pertaining to sex"; means "the average conscience of the time"; means "the present critical point in the compromise between candor and shame at which the community may have arrived here and now"; means "the common conscience of the community according to present day standards" [560a-561a). The trial court further instructed the jury that in determining the "common conscience", the jury was "to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men, women and children; the community north, south, east and west, the large and the small, the very strict and the very liberal" (561a). "Prurient" was defined as meaning "itching, longing, uneasy with desires and longing, of persons having itching, morbid or lascivious longing of desire, morbidity or propensities, lewd" (562a).

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first time, it has been included into this case without any warning to the defendants and without any request having been made by the Government for such a request and therefore, respectfully object to that instruction." (564a-565a; and see, 572a-573a).

The jury returned a number of times to the court room for further inquiries. On one occasion, it asked that the sections of the statutes be read (566a-577a). The next time the jury returned, it asked for the *Roth* decision. The trial court stated it could not give the jury the *Roth* case, but instead read to them "the test" (577a). The Court then added the following to the jury: "The court's interpretation or determination of obscenity in that respect, I direct your attention to my entire charge." (577a). After colloquy with counsel, the court then read what purported to be the entire instruction on obscenity (578a-580a), omitting over objection by counsel for petitioners the statement in the instructions that a thing is obscene only if it goes substantially beyond customary limits of candor in description or representation of sex (580a-581a, 560a).[8]

D. The jurors returned a verdict solely on the book herein involved; as heretofore stated there was disagreement on all the other books. The verdict of guilt was therefore only with respect to Counts 6, 10, 12, 13 and 14 of the indictment (592a).

Upon the return of the verdict, the bail of the individual petitioners was revoked and they were remanded to the county jail (593a-601a). At the request of the Government (593a-601a), the trial court also entered an

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[8]All attempts by petitioners to persuade the trial court to define the standards for judging obscenity within constitutional limits were rejected (644a, P.I. 25; 648a, P.I. 39; 649a, P.I. 40; 655a, P.I. 66; 656a, P.I. 68; 657a, P.I. 70, 657a, P.I. 73, 658a, P.I. 74; 660a, P.I. 100; 662a, P.I. 101; 667a, P.I. 120, 669a, P.I. 125). All efforts on the part of petitioners to have the jury instructed on their theories of defense were also rejected. Petitioners amplify this point and other infirmities in the trial court's instructions and refusals to instruct in the discussion which follows under the Reasons for Granting the Writ.

order restraining the corporate petitioner from making any transfer or disbursement of its assets, except necessary disbursements to enable the corporation to carry on its day-to-day business until a final judgment was entered "and satisfied" in the action. The order also restrained the individual petitioners from making any transfer or disbursement of their assets, except as necessary for living expenses, until such time as a final judgment was similarly entered and satisfied. It was also provided that if petitioners sought to pay attorneys' fees or costs, "they may do so by petition to this Court for the release of such funds" (769a-770a).

Motions for a new trial (690a-693a) and in arrest of judgment (694a-697a) filed on behalf of petitioners were denied by the trial court (601a-602a).

The sentence of the trial court on December 30, 1963 as to petitioner Aday was 5 years' imprisonment on each count, the sentences to run consecutively, or a total of 25 years' imprisonment and a fine of $5,000 on each count, or a total sum of $25,000.

As to petitioner Maxey, the sentence was 5 years on Counts 6 and 10, 2 years' imprisonment on Counts 12 and 13, and 1 year imprisonment on Count 14, the sentences to run consecutively, or a total of 15 years' imprisonment, and a fine of $5,000. on Counts 6 and 10, a fine of $2,000 on Counts 12 and 13, and a fine of $5,000 on Count 14, or a total sum of $19,000.

The corporate defendant was fined the sum of $5,000 on each count, or a total sum of $25,000 (602a-606a).

Judgments of conviction were entered on February 27 1964 (761a-767a). Bail pending appeal was fixed at $75,000 cash for petitioner Aday and $10,000 cash for

petitioner Maxey (606-607a). A motion for reduction of bail on behalf of petitioner Aday was denied (607a, 768a). Bail was thereafter furnished by petitioners, and the appeals to the Court of Appeals followed (12a-13a).

E. The opinion of the Court of Appeals (Appendix A) was rendered on March 22, 1966.

With respect to the instructions of the District Judge, the Court of Appeals held that the trial court had properly instructed the jury that the only burden upon the Government was to prove the contents of the book. The Court of Appeals held that there was no burden upon the Government to prove that the individual petitioners knew that the contents were in fact obscene, and that the trial court had properly refused to charge that honest ignorance of the obscenity of the book was a defense (Appendix A, pp. 12-14).

With respect to other specific claimed errors in the instructions of the trial court and the refusal of the trial court to instruct, the Court of Appeals gave no answers, except to state that the Court would not "attempt detailed discussion of the District Judge's charge to the jury. Suffice it to say that his instructions followed the guidelines of *Roth* and *Jacobellis* and adequately presented the applicable rules of law" (App. A, p. 14).

With respect to petitioners' claims regarding the rulings of the trial court on the exclusion of proffered testimony, oral and documentary, by petitioners, the court below concluded that the rulings of the trial judge were legally proper (Appendix A, pp. 5-10).

The Court concluded that the book involved was obscene, and "that no amount of sophisticated dialectics

could absolve it from classification as 'hard core' " (Appendix A, pp. 1-2). The Court stated that it did not believe that the guarantees of the First Amendment could be "elasticized to embrace *Sex Life of a Cop*" (Appendix A, p. 4), and that "the wise and timesaving succinctness employed by Mr. Justice Potter Stewart in *Jacobellis*" justified the Court in holding that "we know hard core pornography when we see it, and *Sex Life of a Cop* is just that" (Appendix A, p. 5).

With respect to petitioners' claims that the 1958 Amendments to 18 U.S.C. 1461 and 1462 rendered the statutes unconstitutional, the Court of Appeals held that no constitutional fault could be found in the said statutes. With respect to petitioners' contention that the trial court had erred in denying petitioners' motion for transfer of proceedings, the Court of Appeals concluded that petitioners were not deprived of a fair trial as a result of the denial of the motion (Appendix A, pp. 10-12).

The Court of Appeals held that the failure to read the book to the jury did not deprive petitioners of any constitutional right (Appendix A, p. 12), and that petitioners' challenge to the grand jury array was properly dimissed (Appendix A, pp. 14-15).

In only one aspect of the case did the court below appear to feel some misgivings. The Court of Appeals expressed the view "that less severe sentences would have been a more discreet exercise of the District Judge's authority" (Appendix A, p. 17). The Court opined that each of the petitioners may have already "'exhausted his balance with fate'" (App. A. p. 19), but urged the District Judge to so amend the judgments of conviction that petitioner Aday would not receive a

greater prison sentence then 10 years and the petitioner Maxey a sentence "something less than that imposed upon Aday" (App. A, p. 20). The Court added: "We suggest no change in the fines imposed. It is a fair inference that the book business we deal with can well afford them" (App. A, p. 20).

The judgments of conviction were thereupon affirmed, with remand of the cause to the District Court for its reconsideration of the prison sentences in the light of the opinion (App. A, p. 21). As heretofore stated, upon remand, the District Court amended the judgments of conviction to impose a sentence of 10 years' imprisonment upon petitioner Aday and a sentence of 5 years' imprisonment upon petitioner Maxey (App. H, pp. 34-36), and thereupon the Court of Appeals, approving the reductions of sentences, amended the judgments in this cause and affirmed (App. I, pp. 37-38).

Reasons for Granting the Writ.

1(a) The Court of Appeals, upholding the rulings and instructions of the trial court, has held that the federal obscenity statutes require proof only that an accused knew the contents of the alleged obscenity; that the Government has no burden to prove that an individual accused knew that the contents of the book were in fact obscene; and that in a prosecution under the federal obscenity statutes, an accused is not entitled to an acquittal, even if the jury finds that the accused was honestly ignorant of the alleged obscenity of the writing.

The question presented on this facet of the case is of constitutional importance.[9] In *Mishkin v. New York*,

[9]Similar issues with respect to questions of *scienter* are presented in *Redrup v. New York*, October Term, 1965, No. 72, cer-

86 S. Ct. 958, 964, and footnotes 5, 9, this Court construed the state obscenity statute as establishing standards for determining "the vital element of scienter" more stringent than mere knowledge of the contents of a writing. This Court held that proof of guilty knowledge was required in obscenity prosecutions in order "to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity" (86 S. Ct. at 965).

The elimination of a requirement of guilty knowledge in federal obscenity prosecutions would render 18 U.S.C. 1461 and 1462, as amended, vague, ambiguous and violative of the free speech and press and due process provisions of the First and Fifth Amendments. The statutes are only intended to punish those who disseminate books or other writings which substantially exceed customary limits of candor, in the Nation as a whole, in the description or representation of matters pertaining to sex, nudity or excretion; and whose dominant theme, taken as a whole, appeal to the prurient interest of the average person; and are utterly without social importance. A statute which indiscriminatorily punishes those who have no knowledge of these unlawful elements of the offense sweeps within its ambit protected speech and expression, and subjects persons to fine and imprisonment for violation of an offense which provides no ascertainable standards of guilt. *Thornhill v. Alabama,* 310 U.S. 88; *United States v. L. Cohen Grocery Co.,* 255 U.S. 81; *Garrison v. Louisiana,* 379

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tiorari granted April 25, 1966 (34 U.S. Law Week. 3363); and *Austin v. Kentucky,* October Term, 1965, No. 453, certiorari granted April 25, 1966 (34 U.S. Law Week. 3363).

U.S. 64; *Giaccio v. Pennsylvania*, 382 U.S. 399; *Dombrowski, et al. v. Pfister*, 380 U.S. 479.

The self-censorship compelled by the statutes as thus construed could well deprive the public of access to constitutionally protected material. The absence of *scienter* in the statutory proscription compels publishers, distributors and booksellers to become public censors. It places upon them the burden of separating the obscene from the nonobscene. This indeed would be a "virulent" censorship condemned by both law and history. *Smith v. California*, 361 U.S. 147; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478.[10]

The holding of the courts below, in addition, that honest ignorance of the obscene nature of a writing is not a defense in a federal obscenity prosecution creates similar constitutional infirmities in 18 U.S.C. 1461 and 1462. See, Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 103-108 (1960); A.L.I. Model Penal Code (Tent. Draft No. 6, 1957), 51; Note, The Supreme Court 1959 Term, 74 Harv. L. Rev. 81, 126-128 (1960). See also, Mueller, On Common Law Mens Rea, 42 Minn. L. Rev. 1043, 1072-1073 (1958).

A statute which deprives an accused in an obscenity prosecution of a defense of good-faith belief that the

[10]State courts have required the prosecution to plead and prove that the accused knew the material was obscene. *State v. Locks*, 397 P. 2d 949 (Ariz. 1964); *State v. Sul*, 146 Conn. 78, 147 A. 2d 686, 691 (1958); *Demetropolos v. Commonwealth*, 342 Mass. 658, 175 N.E. 2d 259, 262 (1961); *State v. Oman*, 261 Minn. 10, 110 N.W. 2d 514, 520 (1961); *Cohen v. State*, 125 So. 2d 560, 563 (Fla. 1961); *State v. Hudson County News Co.*, 35 N.J. 284, 173 A. 2d 20, 23 (1961); *State v. Ramos*, No. 15235, D.C. Iowa, Pottawattamie County, Council Bluffs (April 7, 1966), unreported.

material involved is not obscene would appear to be susceptible of sweeping and improper applications and is a potential deterrent to constitutionally protected activities. Moreover, to deny one who is accused of selling an alleged obscene book the opportunity to present evidence that he had no knowledge that the book was obscene is a denial of a due process "in the primary sense", the right to be meaningfully heard in one's defense. *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 681; *Saunders v. Shaw,* 244 U.S. 317; *Hovey v. Elliott,* 167 U.S. 409, 417.

An instruction to a jury in a federal obscenity prosecution that conviction may be predicated solely on proof of knowledge of contents does violence to the free speech and press and due process provisions of the Constitution. This Court has repeatedly emphasized that sex and obscenity are not the same, from which it follows, it is submitted, that the mere fact that a publisher, distributor or bookseller knows that the contents of a writing concerns itself with sex does not rationally mean that he knows that such book is obscene. See, *Grove Press, Inc. v. Gerstein,* 378 U.S. 577; *Tralins v. Gerstein,* 378 U.S. 576; *A Book etc. v. Attorney General of Massachusetts,* 86 S. Ct. 975; *Grove Press, Inc. v. Christenberry,* 276 F. 2d 433 (2 Cir. 1960), affirming 175 F. Supp. 488 (D.C. N.Y. 1959).

To permit a conviction solely upon proof of knowledge of contents of a writing without proof of knowledge of obscenity is in effect to punish guiltless behavior. Such a standard permits arbitrary presumptions of facts essential to guilt; undermines all the procedural safeguards required in prosecutions involving speech and press; and encourages the self-censorship and pri-

vate suppression of constitutionally protected material which the Constitution is intended to prevent. *Speiser v. Randall,* 357 U.S. 513; *Smith v. California,* 361 U.S. 147; *Freedman v. Maryland,* 380 U.S. 51; *Elfbrandt v. Russell,* 86 S. Ct. 1238; *United States v. Romano,* 382 U.S. 136.

(b) The trial court, upheld by the court below, refused to instruct the jury that a writing could not be deemed obscene unless utterly without redeeming social importance. Moreover ,the trial court, upheld by the court below, refused to instruct the jury that the alleged pruriency of the material was not to be balanced against the social importance of the material, and that the presence of matters of social importance in the book gains for the book its position as constitutionally protected utterance. The trial court refused these requests to instruct upon the ground that they were "incorrect" statements of the law "as to elements of the offense which is covered" (535a).

In *A Book, etc. v. Attorney General of Massachusetts,* 86 S. Ct. 975, this Court emphasized, as it had heretofore emphasized in *Jacobellis,* that a book cannot be proscribed unless it is found to be ***utterly*** without redeeming social importance. "Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor cancelled by its prurient appeal or patent offensiveness" (86 S. Ct. at 978, and see fn. 7). The courts below excluded the element of social importance from the offense proscribed by the statutes, and the jury was led to concern itself primarily with the alleged prurient interest of the material, disregarding the social import-

ance of the material and the fact that the contents of the material did not exceed the limits of candor, in the Nation as a whole, in the description and representation of matters pertaining to sex and nudity. Such construction of the statutes does violence to the free speech and press guarantees of the First Amendment. *Roth v. United States,* 354 U.S. 476; *Kingsley Int'l Pic. Corp. v. Regents,* 360 U.S. 684; *Jacobellis v. Ohio,* 378 U.S. 184; *Griswald v. Connecticut,* 381 U.S. 479; *Lamont v. Postmaster General of the United States,* 381 U.S. 301.

(c) The Court of Appeals upheld an instruction of the trial court which advised the jury in effect that a non-obscene writing could be condemned if the jury found the writing to be "filthy" as defined by the Court. The trial court did not instruct the jury as requested that the terms contained in 18 U.S.C. 1461 and 1462 embraced only a single concept of "obscenity", but instead held that the statutes cover material which do no more than treat sexual matters in a "vulgar and revolting way", thus tending to "rouse a feeling of disgust and revulsion" (562a).

The statutes, so construed, create vague, ambiguous and unascertainable standards of guilt, and such overly broad statutes create danger zones within which protected expression may be inhibited and suppressed. *Roth v. United States,* 354 U.S. 476; *Kingsley Int'l Pic. Corp. v. Regents,* 360 U.S. 684; *Jacobellis v. Ohio,* 378 U.S. 184; *Tralins v. Gerstein,* 378 U.S. 576; *Grove Press, Inc. v. Gerstein,* 378 U.S. 577.

This Court has held that the holding in *Roth* does not recognize any state power to restrict the dissemination of books which are not obscene. *Smith v. California.*

361 U.S. at 152. In *Jacobellis,* this Court stated that "it is only 'obscenity' that is excluded from the constitutional protection" (371 U.S. at 188). In *Manual,* the material involved was described as "dismally unpleasant, uncouth and tawdry"; but this was held not to make them "obscene" (370 U.S. at 490). See also, *Flying Eagle Pub., Inc. v. United States,* 273 F. 2d 799, 803 (1 Cir. 1960), cited with approval in *Manual* (370 U.S. at 483-484, fn. 5).

It is submitted that an offense to a sense of propriety in some readers cannot possibly justify the suppression of writings ordinarily protected by the First Amendment. Professors Lockhart and McClure have stated "that a ruling of mere offensiveness cannot constitutionally justify censorship of literature would seem compelled by any reasonable judgment based upon balancing the interests pursuant to the constitutional test for freedom of expression". *Literature, The Law of Obscenity, and the Constitution,* 38 Minn. L. Rev. 295, 378 (1954). See also, Kalven, *Metaphysics of the Law of Obscenity,* Supreme Court Review (1960), 4, 42.

Moreover, as a matter of procedural due process a separate offense of disseminating allegedly "filthy" material was never charged nor tried in the case herein. The letter and spirit of Rule 30 of the Federal Rules of Criminal Procedure were violated by the trial court's failure to inform counsel of its proposed action with respect to the distinction between "obscenity" and "filthy." See, *Downie v. Powers,* 193 F. 2d 760, 767 (10 Cir. 1951). The jury was informed that they could convict on a specific charge never made and on a specific theory never tried. This, it is submitted, was a clear violation of procedural due process. *DeJonge v.*

Oregon, 299 U.S. 353; *Cole v. Arkansas,* 333 U.S. 196, 201.[11]

(d) Turning from the trial court's instructions on "filthy" to the "concept" of "obsenity", the charge reveals a potpourri of erroneous, contradictory and misleading meanings ascribed to the phrase in the statutes—"obscene, lewd and lascivious"—so as to make the law of the case inexplicable to the jury and the statutes so vague and indefinite as to do violence to the provisions of the Constitution. See, *Yates v. United States,* 354 U.S. 298, 312-327; *Terminiello v. City of Chicago,* 337 U.S. 1; *United Brotherhood v. United States,* 330 U.S. 395, 410; *Bollenbach v. United States,* 326 U.S. 607.

The trial court permitted the jury to find that the book was without constitutional protection if it had a tendency to arouse sexual impulses and lead to sexually impure thoughts, or to corrupt and deprave the minds and morals of *those into whose hands the book might fall or was likely to reach.* Since the community was described as including the "young", the "uneducated" and "women and children" (561a), the jury was in effect told that the book herein, charged with being distributed generally in various cities in the judicial district, could be condemned if the jury found that the young and uneducated were likely to read the book and

[11]Whether the statute, so far as the term "filthy" is concerned can be constitutionally applied to communications in letters or writings between private persons not intended for distribution to the general public raises questions not presented here. In *United States v. Limehouse,* 285 U.S. 424, the indictment, unlike the indictment here, charged only the mailing of a "filthy letter". The indictment contained no reference to "obscene, lewd or lascivious" (285 U.S. at 426), nor were there raised the constitutional issues canvassed in *Roth* and subsequent decisions of this Court.

be stirred to lustful or sexually impure thoughts. The charge of the trial court in this respect was essentially the charge of Chief Justice Cockburn in *Regina v. Hicklin,* 3 Q.B. 360, 371 (1868), rejected in *Roth* as unconstitutionally restrictive of freedoms of speech and press (354 U.S. at 489). See also, *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, 486-487; *Butler v. Michigan,* 352 U.S. 380.

With respect to each essential ingredient of the term "obscenity", the trial court refused to confine its broad, ambiguous and conflicting instructions (P.I. 25, 644a; P.I. 39, 648a-649a; P.I. 40, 649a; P.I. 52, 652a; P.I. 102, 664a; P.I. 114, 667a; P.I. 125, 669a). The trial court refused to limit its unduly broad definition of prurient interest (P.I. 36, 647a-648a; P.I. 61, 654a; P.I. 62, 654a; P.I. 75, 658a). The opinion testimony of expert witnesses was disparaged unfairly and contrary to law (549a-551a). The Government's theory of the case was presented to the jury (550a-551a), but petitioners' contrary position (538a-539a) was not stated. Moreover, the jury was instructed to take judicial notice of the obscenity laws of "all the fifty states" (558a-559a). It is, of course, a matter of common knowledge that the various States have laws which if applied to the same facts would result in contrary decisions or judgments.

2. Since the Government failed to prove the essential ingredients of the offense charged in the indictment, the judgments of conviction herein deprive peti-

tioners of their liberties and property without due process of law and abridge the exercise of freedoms of speech and press.

The Government made no attempt by evidence to prove that the book here involved went substantially beyond customary limits of candor in the description or representation of matters pertaining to sex. It presented no evidence to show that the predominant appeal of the book was to a shameful or morbid interest in sex. It presented no evidence to show that the book was utterly without social importance.

The Government made no attempt to prove, and contended that it was not required to prove, knowledge by petitioners that the book was obscene. Indeed, with respect to petitioner Aday, the Government's own evidence showed that he insisted on deletions from the book of any language detrimental to any character because of race; which had derogatory remarks with reference to Negroes; which had reference to four-letter words used in a derogatory fashion with regard to women; and certain five-letter words which made derogatory reference to men (248a-249a). The Government's witness testified that these deletions were in accordance with a policy of the business (248a). There were also deleted portions of the story which tended to reflect that everybody in the writing was corrupt (249a). The addition made in the original manuscript was with respect to the principal character thinking of having intercourse with a woman in the story. As pub-

lished, intercourse between the parties actually occurred (258a).

With respect to petitioner Maxey, not only was there a failure to prove knowledge of obscenity, but there is a lack of evidence to prove that he even had knowledge of the contents of the writing.[12]

The Government never established that the book herein was knowingly sent by petitioners from Fresno, California to the specific establishments and cities in the Southern Division of the Western District of Michigan, as alleged in the indictment.

In short, there was no proof in the record offered by the Government to prove the essential ingredients of the offense charged in the indictment, and the uncontradicted evidence on behalf of petitioners establishes the non-obscenity of the writing and the absence of *scienter* on the part of petitioners.

Where the "transcendent value of speech" is involved, due process requires "that the State bear the burden of

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[12]So far as the record here is concerned, nothing in the production, sale or publicity relative to the book herein involved amounts to the "pandering" found in the record by this Court in *Ginzburg v. United States*, 86 So. 2d 942. Indeed, the record is significantly to the contrary and, moreover, unlike *Ginzburg*, this case was tried to a jury and not to a court. The trier of the facts in the case herein never was presented with any issue of "pandering" and no such issue was ever decided by the trier of facts. See, *De Jonge v. Oregon*, 299 U.S. 353; *Cole v. Arkansas*, 333 U.S. 196. See also, *Parr v. United States*, 363 U.S. 370, 391. Moreover, contrary to the views of the courts below, this Court held in *Ginzburg* that commercial activity in itself is no justification for narrowing the protection of expression secured by the First Amendment. It should also be noted that petitioners requested the trial court to instruct the jury that conviction under the indictment depended, among other things, upon proof that each of the petitioners "had the specific intent to appeal to the prurient interest of the average person, reading the aforesaid books" (P.I. 101, 662a-663a), but the trial court refused to give such instruction.

persuasion to show that the [accused] engaged in criminal speech." *Speiser v. Randall,* 357 U.S. 513, 526; *Freedman v. Maryland,* 380 U.S. 51; *New York Times Co., et al. v. Sullivan,* 376 U.S. 254, 271, 277-280, 283-288; *Thompson v. City of Louisville,* 362 U.S. 199, 206, and cases cited in fn. 13.

Books and writings do not in themselves prove such elements as contemporary standards, prurient interest or social importance. Whether a book exceeds limits of candor, or appeals to a shameful or morbid interest in sex, or is utterly worthless, can only be established by evidence and not by conjectures, presumptions or subjective reactions. *Tot v. United States,* 319 U.S. 463); *New York Times Co.; et al. v. Sullivan,* 376 U.S. 254; *United States v. Romano,* 382 U.S. 136. As this Court has warned on different occasions, and as the Court of Appeals of the Second Circuit made clear in *United States v. Klaw,* 350 F. 2d 155 (2 Cir. 1965), courts and juries in obscenity prosecutions do not sit to act as censors of material personally distasteful to them.

Without proof by evidence, reviewable by an appellate court, that limits of candor have actually been exceeded, or that a writing appeals to no other interest but prurient interest, or is without any importance at all, there is little assurance, it is submitted, that non-obscene writings can be protected. As was stated by the Court of Appeals in *Klaw,* "it is the record and not our feelings that must control. . . . Unless there be this protection, a witch hunt might well come to pass which would make the Salem tragedy fade into obscurity" (350 F. 2d, at 170).

To permit suppression and punishment without proof of the essential ingredients of an offense, ingredients which are made necessary by the requirements of the Constitution, undermines a broad category of rights guaranteed by the free speech and press and due process provisions of the Constitution. The right to fair notice and hearing, the right of confrontation and the assistance of counsel are meaningless and constitute a mere gloss when the prosecution is not required to prove the elements of an offense. *Pointer v. Texas,* 380 U.S. 400; *Douglas v. Alabama,* 380 U.S. 415; *Brookhart v. Janis,* 86 S. Ct. 1245; *Turner v. Louisiana,* 379 U.S. 466. Without proof of the elements of the offense of obscenity, "it would be altogether too easy for any prosecutor to stand before a jury, display the exhibits involved, and merely ask in summation: 'Would you want your son or daughter to see or read this stuff?' A conviction in every instance would be virtually assured." *United States v. Klaw, et al.,* 350 F. 2d, at 170.

3. Not only was there a failure of proof of the essential ingredients of the offense, but the trial court deprived petitioners of their legal and constitutional rights by the exclusion of oral and documentary testimony, and by the rejection of offers of proof, all intended to establish the nonobscenity of the book and the absence of unlawful knowledge and intent on the part of petitioners.

On the issue of comparison evidence (228 F. Supp. at 191-201, 735a-756a), the trial court initially eliminated from jury consideration categories of writings which the trial court decided "as a matter of law" were not similar to the book here involved (735a). Thus,

there were eliminated "magazines"; "classics"; works "of an undeniable literary value"; books "dealing in a technical way with marriage and the family, and sexual relations"; scientific treatises or text books of supplementary material "in the area of sociology, psychiatry and psychology"; "medical textbooks of any nature"; and "medical treatises" (735a). These were, in addition, asserted to be "non-exclusive descriptions" (735a). This ruling, of course, in one stroke virtually eliminated all comparable material as evidence in the case.

The trial court went further. It held that if a book was found to be comparable, then the book would not be submitted into evidence for any purpose (743a-744a), and "no parts of any book so sought to be introduced will be read to the jury" (744a). If a book, found comparable, cannot be introduced into evidence, and no parts read to the jury, what possible value to an accused in an obscenity prosecution does such comparison evidence have, and what is the function of the jury under such circumstances?

Having thus made the aforesaid preliminary rulings, the trial court advised petitioners that they must convince the court, as a matter of law, that the proffered comparison material enjoys "substantial acceptability in the community", and also "convince the court first as a matter of law in the course of the [qualified] witness' testimony that the books are substantially similar to the challenged books" (744a).

In compliance with the directions of the trial court, petitioners made a written offer of proof (608a-619a). The comparable books named were *Fanny Hill* by John Cleland; *Lady Chatterley's Lover* by D. H. Lawrence; *Tropic of Capricorn* by Henry Miller; *Naked Lunch* by

William Burroughs; *Carpetbaggers* by Harold Robbins; *A Cold Wind in August* by Burton Wohl; *Clip Joint Cutie* by Monte Steele and *Sin Binge* by John Baxter. The offer of proof, twelve pages in length, with detailed statements as to the evidence to be adduced with respect to each book on the issues of similarity and acceptability (608a-619a) was dismissed by the trial court as "conclusions only" (745a). Moreover, stated the trial court, books like *Lady Chatterley's Lover* and *Tropic of Capricorn* were not comparable as a matter of law (332a-335a).

The offer of proof being rejected, the trial court now permitted the "qualified witness" to attempt to prove what the court had already apparently decided was not provable (335a). The witness Kirsch was called by petitioners. Upon examination, the trial court agreed that he was a qualified witness (325a). Petitioners then sought to prove through the witness the comparability of six of the writings named in the written offer of proof to the book named in the indictment, to wit, *Carpetbaggers, Fanny Hill, Lady Chatterley's Lover, Tropic of Capricorn, A Cold Wind in August* and *Naked Lunch* (358a-359a), the books which the witness had read. Stated the trial court:

> "Well, you'll have to establish on the record, out of the presence of the jury, the similarity of the books before you go into what you propose this witness would testify to in the presence of the jury" (360a-361a).

Therefore, out of the presence of the jury, the witness testified with respect to the six offered books (361a-409a). Despite the witness' conceded expertise and despite the testimony of the witness that the mate-

rial was comparable, all of the books, on objection of the Government, were refused admission into evidence as comparison testimony. A perusal of the writings, as well as the testimony of the expert witness, reveals that they were clearly comparable writings generally accepted in the community. Their admissibility as evidence was clear; the weight to be given to such evidence was, of course, a matter for the jury.

Other offers of proof (626a-637a) and other comparable books held constitutionally protected material by judicial opinions were rejected as not "generally acceptable", although concededly similar (469a-474a, 493a-494a).

Unmentioned by the trial court in its written opinion, and unmentioned by the Court of Appeals, was the refusal of the trial court to permit comparable testimony to be offered from the Kalamazoo Library of Kalamazoo, Michigan (468a, 474a, 481a-483a), and from the Fiction Department of the Grand Rapids Library (414a-416a). Also excluded was evidence offered by petitioners to show that comparable paperback books were sold in the City of Grand Rapids and in every city named in the indictment herein, and indeed throughout the Nation, together with covers and blurbs similar to the book involved herein (416a-423a), although the trial court permitted, at the request of the Government, the jury to consider the covers of the indicted books and blurbs (417a-420a, 717a). Offers of proof to show that the Government's own witnesses, the wholesalers and retailers to whose establishments the books named in the indictment had allegedly been shipped, had distributed for years paperback books similar in cover, blurbs and appearance to the cover and blurbs on the book herein

involved were all rejected (282a-283a, 429a-432a, 622a-625a). And offers of proof with respect to newspaper stories reflecting instances similar to those contained in *Sex Life of a Cop* were also rejected (402a-403a).

No expert testifying on contemporary community standards or literary value with respect to *Sex Life of a Cop* was permitted to mention any other comparable book in his testimony, nor his counsel permitted to mention another book before the jury (735a). The expert witnesses could venture the opinion before the jury that community toleration has broadened, and that *Sex Life of a Cop* was within the area of community toleration — *but the bases of the experts' opinions* were entirely unknown to the jury by reason of the trial court's rulings (237a-238a, 241a, 251a-253a, 255a-259a, 261a-262a, 273a-280a, 308a, 311a-312a, 325a-339a, 346a, 358a-396a, 398a, 411a, 443a, 466a-467a, 541a-542a).

The exclusion of the evidence proffered by petitioners was contrary to law and amounted to a denial of due process of law and an abridgment of freedoms of speech and press. *Smith v. California,* 361 U.S. 147, 165, 171-172; *Speiser v. Randall,* 357 U.S. 513, 520; *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, 497; *In re Harris,* 56 Cal. 2d 856, 16 Cal. Rptr. 889, 366 P. 2d 305 (1961); *Yudkin v. State,* 229 Md. 223, 182 A. 2d 798.

4. The book *Sex Life of a Cop* by Oscar Peck is entitled to the protection of the free speech and press provisions of the First Amendment. Petitioners invoke the constitutional judgment of this Court. *Jacobellis v. Ohio,* 378 U.S. 184, 187-190. In a constitutional sense, the said book is not obscene.

The book *Sex Life of a Cop* has ideas of social importance; does not exceed contemporary standards in

the depiction of sex; and does not appeal to a shameful or morbid interest in sex. Measured by the constitutional standards for judging obscenity as enunciated and applied by this Court, the book is not obscene and is entitled to the protections of the First Amendment.[13]

Sex Life of a Cop is a picaresque novel. It is a farcical and satirical writing which makes a social point. The book deals with current standards of behavior and morality in an ordinary municipality. The writing demonstrates that there is much hypocrisy and corruption among persons, both lay and official, in the sense that they do not fulfill their public responsibilities. That the corruption is revealed often in terms of sexual behavior is a theme common among other writers who have explored similar areas.

Petitioners have printed in Appendix K hereto some excerpts from the book which demonstrate the social problems with which the writing is concerned.

It is submitted that the book portrays with considerable accuracy and within the permissible confines of a work of fiction the problems which are attested to daily by the newspapers, the learned journals, radio and television, motion pictures, works of fiction and nonfiction, and, in short, all media of communication. It is

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[13] *Times Film Corp. v. City of Chicago*, 355 U.S. 35 ("Game of Love" — film); *One, Inc. v. Olesen*, 355 U.S. 371 ("One — The Homosexual Magazine"); *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 ("Sunshine and Health" — nudist magazine); *Kingsley Int'l Pic. Corp. v. Regents*, 360 U.S. 684 ("Lady Chatterley's Lover — film); *Jacobellis v. Ohio*, 378 U.S. 184 ("The Lovers" — film); *Tralins v. Gerstein*, 378 U.S. 576 (*Pleasure Was My Business*); *Grove Press, Inc. v. Gerstein*, 378 U.S. 577 (*Tropic of Cancer*); *A Book etc. v. Attorney General of Massachusetts*, 86 S. Ct. 975 (*Fanny Hill*). See also, *Grove Press, Inc. v. Christenberry*, 276 F. 2d 433 (2 Cir. 1960) affirming 175 F. Supp. 488 (D.C. N.Y. 1959) (*Lady Chatterley's Lover*).

true that the book is critical of officials of government, but the book has significant social importance for just that reason. "Truth," this Court has stated, "may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Garrison v. Louisiana*, 379 U.S. 64, 74.

Moreover, the undisputed testimony of the experts, Robert J. Kirsch, Literary Editor of the Los Angeles Times, author, novelist and teacher (289a-292a, 327a-329a); Edward L. Galligan, Associate Professor at Western Michigan University (432a-435a); and Guy Endore, noted novelist, biographer and screen writer (495a-500a), was uniform in averring that the book had ideas of social significance (352a-355a, 458a-460a, 524a-531a).

The book clearly does not exceed the customary limits of candor in the depiction of sex and sex relations. The sexual language and the language of the sexual passages and the manner of handling these passages do not go beyond customary limits of candor of present-day writing "and indeed, the language falls short of it" (357a). The sexual descriptions in the writing are less candid and less vivid than the accounts in quite a considerable number of contemporary books (466a). This conclusion is not only compelled by a comparison of the book herein with those writings which have constitutional protection by the judicial determination of this Court and other courts in the federal and state jurisdictions, but also from a perusal of the contemporary scene where there is a frankness and candor in discussion of sex in books which are generally accepted in the community today, and which frankness and candor the book here involved does not even attempt.

5. Petitioners submit that the multiple venue prosecutions and forum-picking now authorized by 18 U.S.C. 1461 and 1462, as amended in 1958, render the statutes unconstitutional in violation of the provisions of the First, Fifth and Sixth Amendments to the United States Constitution.

When this Court rendered its decision in *Roth* in 1957, no question of venue was raised in the argument before the Court and, indeed, no question could be raised because the venue in both the federal and state prosecutions was laid where the deposit for mailing had been made. Prior to 1958, the offense under the federal obscenity statutes was complete when the deposit for mailing or delivery was made. *United States v. Ross,* 205 F. 2d 619 (10 Cir. 1953).

For many years, postal officials sought to change the venue limitations of the obscenity statutes. Their efforts were crowned with success when they found a receptive audience in a House Judiciary Subcommittee then headed by Congressman Francis Walter. See, Paul and Schwartz, *Federal Censorship: Obscenity in the Mail* (1961), 185-186. The Post Office Department and the Attorney General urged Congress to enact H.R. 6239 in order "to overcome the effect of the Ross decision, making it possible to prosecute violators of section 1461 at the place at which the objectionable matter is mailed, at the place of address or delivery, or in any judicial district through which such mail matter is carried." 1958 U.S. Code, Cong. & Adm. News, pp. 4707-4708.

The Senate initially adopted a middle view between the *Ross* rule and the rule contended for by the Post Office Department, this upon the ground "that unrestricted 'forum shopping' can lead to abuses and is,

therefore against public policy." S. Rep. 1839, 1958 U.S. Code, Cong. & Adm. News, p. 4705. The House, however, declined to go along with the Senate in amending the statute to punish only the deposit or receipt of material, and the final conference report which was adopted made the offense a continuing crime "from the point of deposit, in transit, and at the point of delivery." Conf. Rep. (H.R. 6239), 1958 U.S. Code, Cong. & Adm. News, p. 4709.

When H.R. 6239 was finally reported out and passed, "the Judiciary Committee openly warned that United States prosecutors were not to abuse their new power." Paul and Schwartz, *Ibid.* at 186. In response, the Department of Justice hinted at the adoption of an unofficial policy which restricted venue "either to the place of mailing or to an area where a large volume of material is sent—to areas where the dissemination has had an 'impact,' as one government lawyer put it." Paul and Schwartz, *Ibid.*, at 186.[14]

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[14]The alleged "unofficial policy" restricting venue to the place of mailing or to an area where a large volume of material has been sent has in actual practice become a dead letter. Book publishers and distributors, as well as printers, authors and others involved in the circulation of the press, are being increasingly subjected to prosecutions under the statutes, as amended, in far off jurisdictions where the so-called impact has been minimal, that is, where in the course of national distribution throughout the country the books or other writings sent to the particular area have been extremely small and this known to the Government. It has become plain that the statutes are now being used by Government officials to place the greatest financial strain upon publishers, distributors and other persons, to make it impossible to bring witnesses and experts in defense of the accused and to impose such burdens as will finally put the different publishers and distributors out of business even though such publishers and distributors may be ultimately successful in vindicating their rights.

In Appendix L printed hereto, petitioners detail the legal proceedings involving petitioner Aday prior to 1958 and his vindication, and the subsequent prosecutions instituted against the same petitioner after 1958.

This Court admonished in *Roth* that the door barring federal intrustion into the areas of speech and press must be kept "tightly closed" and opened only "the slightest crack" necessary to prevent encroachment upon more important interests. The substantial procedural changes made in the federal obscenity statutes by the 1958 Amendments permitting multiple venue prosecutions have, it is submitted, resulted in a wide opening of the door and in a substantial intrusion into protected expression. The operation and effect of the method by which the circulation of books and other writings is restrained by the federal obscenity statutes as amended should, it is submitted, be subjected to "close analysis and critical judgment" by this Court. *Speiser v. Randall,* 357 U.S. 513, 520.

In a series of decisions, this Court held that different legal procedural devices which had the effect of inhibiting freedoms of speech and press could not be upheld; that a statute on its face which is clearly capable of many abuses threatening those who exercise their rights of free expression with the burdens of a criminal prosecution is invalid; and that where a statute in addition has a potentially inhibiting effect on the exercise of freedoms of speech and press, the statute is also constitutionally invalid because it fosters self-censorship and the denial of access by the public to constitutionally protected material. *Smith v. California,* 361 U.S. 147; *Marcus v. Search Warrants of Property etc.,* 367 U.S. 717; *A Quantity of Copies of Books, et al. v. Kansas,* 378 U.S. 205; *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58; *Freedman v. Maryland,* 380 U.S. 51. See also, *New York Times Co., et al. v. Sullivan,* 376 U.S. 254; *Dombrowski, et al. v. Pfister,* 380 U.S. 479; *Giaccio v.*

Pennsylvania, 382 U.S. 366; *Elfbrandt v. Russell*, 86 S. Ct. 1238.

As the Honorable J. Skelly Wright stated in *Reed, et al. v. Corcoran*, 354 F. 2d 519, 522 (D.C. Cir. 1965), the question as to whether the prosecution "may constitutionally be allowed a multiple choice of forum" is a substantial one. See also, *Ginzberg v. United States*, 86 S. Ct. 942, 944, fn. 1.

6. The petitioners submit that the trial court deprived petitioners of clear, legal and constitutional rights in holding that the trial court was in effect without power or discretion to grant a transfer of proceedings in a federal obscenity prosecution, pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, in view of the 1958 Amendments to 18 U.S.C. 1461 and 1462. The trial court declined to exercise its authority when the facts before the court made it the duty of the court to do so, petitioners have duly presented an uncontradicted record imperatively requiring a change of venue pursuant to Rule 21(b). The trial court misjudged its powers and grossly abused its discretion in refusing to grant petitioners' motion for transfer of proceedings, petitioners having conclusively shown that such transfer was necessary in the interest of justice, in order to afford each of petitioners a fair trial, and in order to avoid deprivation of each of petitioner's liberty and property without due process of law and the abridgment of freedoms of speech and press.

Rule 21(b) was designed as an instrument of justice, and to insure the fair administration of criminal justice in the federal courts of the United States. The Rule was promulgated primarily to avoid in particular cases the onerous and unfair consequences of statutes

like 18 U.S.C. 1461 and 1462 permitting multiple prosecutions and forum-picking. The case herein was one which peculiarly called for the mitigating relief provided by Rule 21(b). Federal Rules of Criminal Procedure, Rule 21(b); *United States v. Olen, et al.*, 183 F. Supp. 212 (D.C. N.Y. 1960); *United States v. Erie Basin Metal Products Co.*, 79 F. Supp. 880 (D.C. Md. 1948); *United States v. National City Lines*, 7 F.R.D. 393 (D.C. Cal. 1947); Notes of Advisory Committee on Rules Under 21(b); *Cyclopaedia of Federal Procedure* (2d ed. 1952), Vol. II, §39.150, p. 110.

The question of the relation between the federal obscenity statutes and Rule 21(b) is of great public importance, not only in the fair administration of criminal justice, but in its potential effect upon the free circulation of the press. If a national distributor of books and other media of communication may be prosecuted in any judicial district in the United States where the books are deposited, in transit, or delivered, and if district courts are without power or discretion in any such obscenity prosecution to grant a change of venue in the interest of justice when the record imperatively requires such a change of venue, then the free circulation of the press and the public's access to constitutionally protected material are plainly undermined. *Smith v. California*, 361 U.S. 147; *Marcus v. Search Warrants of Property, etc.*, 367 U.S. 717. See also, *Ginzburg v. United States*, 86 S. Ct. 942, 944, footnote 1.

7. Despite the specific request of petitioners that the book involved be read openly in court to the jury, the trial court refused to allow such reading. What the trial court overlooked was that the issue here was not the subjective reactions of the jury, or of the court, or

of counsel, but of the right of the public to know what was going on, and whether or not the petitioners were receiving justice. This is the true significance of a public trial and the reason why a public trial is a defendant's right under the Constitution of the United States. *In re Oliver*, 333 U.S. 257, 266.

The gist of the case against petitioners was that they had disseminated a book entitled *Sex Life of a Cop* which allegedly was obscene, lewd, lascivious and filthy. A verdict of guilt was returned against petitioners and they were respectively sentenced to 25 and 15 years' imprisonment, later reduced to 10 and 5 years, and fined a total of $69,000, for the dissemination of a single book. Yet, the public which sat in that courtroom in Grand Rapids did not know and does not know today what the contents of the book are or why petitioners received such harsh and cruel sentences. In effect, the public was as much excluded from the essential portion of the trial herein as if they had actually been prevented from entering the courtroom.

8. The trial court held that petitioners' motion to dismiss the indictment (grand jury) was properly stricken on the motion of the Government (99a-112a) because petitioners had impliedly and expressly waived any objections to the array by failing to make the motion prior to the return of the indictment. The trial court held that petitioners' motions made prior to trial and pursuant to Rules 6 and 12 of the Federal Rules of Criminal Procedure came too late, and that petitioners had waived their objection to the array by failing to make their motions as soon as they became aware that an indictment might be returned by the grand jury. Reliance was placed upon *Agnew v. United States*, 165 U.S. 36. See, Appendix B, herein.

The Federal Rules of Criminal Procedure were adopted in 1945, almost fifty years after the decision of this Court in *Agnew*. The Notes of the Advisory Committee under Rule 6 of the Federal Rules of Criminal Procedure specifically state: "Failure to challenge is not a waiver of any objection. The objection may still be interposed by motion under rule 6(b)(2)." See also, the Notes of the Advisory Committee on Rules under Rule 12 of the Federal Rules of Criminal Procedure.

In view of the trial court's ruling striking petitioners' motion to dismiss the indictment, there was never any complete presentation of the evidence on this issue in the case; findings of fact and conclusions of law were never submitted, despite the fact, as the record shows (128a-192), there were serious legal questions involved as to whether or not the grand jury had been properly selected. It appears clear that the trial court declined to make an appropriate determination of the issues before the court because it had concluded that the challenge to the array was waived, and therefore required no determination on the merits. In all respects, the actions of the trial court were, it is submitted, wholly erroneous, and arbitrarily deprived petitioners of basic legal and constitutional rights.

9. Petitioner Aday has been subjected to consecutive sentences of imprisonment, and maximum fines have been imposed consecutively upon all petitioners, all for the alleged shipment of a single book to the Western District of Michigan in August and September 1959.

Thus, according to the courts below, a decision to prosecute for a book dealing with sex in any judicial district in the United States could result in an indict-

ment charging an infinite number of counts and authorize the imposition of 5-year sentences and maximum fines of $5,000 on each count. There does not appear to be any doubt that upon the trial court's theory a national distributor of an allegedly obscene book might face punishment in any judicial district in the United States to a lifetime imprisonment and an astronomical figure in fines. Under such rule of law, any publisher or national distributor of a book dealing frankly with sex would clearly hesitate to send such a book into circulation for the general public.

Congress, it must be presumed, did not intend, by amendments to 18 U.S.C. 1461 and 1462 in 1958, to do violence to constitutional standards. Indeed, as the legislative history indicates (1958 U.S. Code, Cong. and Adm. News, p. 4012, *et seq.*), Congress was concerned that the Post Office Department and Department of Justice should not abuse the provisions by forum-picking which might abusively lead to the suppression of constitutionally protected material. In view of the constitutional provisions and legislative history, the statutes here, which should be strictly construed because of their penal nature, can only be reasonably interpreted to mean that the prosecutor at the time of an indictment can only treat the dissemination of a single book as a single offense for which there can be only one punishment. The offense made punishable under 18 U.S.C. 1461 and 1462 is conduct which arises from a "singleness of thought, purpose or action, which may be deemed a single 'impulse' ". *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 224.

Moreover, the act of distribution with respect to one book is essentially intended as a single act. A policy of

the law which would permit the prosecutor to multiply the offenses by the number of outlets to which the book is sent would manifestly lead to limitless punishment and to suppressive effects, contrary to the law and the Constitution. See, *Yates v. United States*, 355 U.S. 66. See also, *Crepps v. Durden*, Cowp. (Eng.) 640, cited with approval in *Ex parte Snow*, 120 U.S. 274, 283.

10. The imposition of 10 years and 5 years' imprisonment upon the individual petitioners, with total fines of $69,000, for the mailing and shipment of a single book is so grossly disproportionate to the offense committed as to be completely arbitrary and shocking to a sense of justice. In an age where bookburning has been universally condemned, it is contrary to all civilized standards to impose sentences of 10 years and 5 years upon persons allegedly responsible for the mailing of a single writing. Just as the concept of consecutive punishment for a single offense constitutes an unusual punishment interdicted by the Constitution, so the imposition of total punishment of 15 years and $69,000 in fines for the mailing of an allegedly single writing offends the constitutional provisions. *Weems v. United States*, 217 U.S. 349, 551; *Robinson v. California*, 370 U.S. 660, 675-676.

Nor should it be overlooked that the cruel and unusual punishment imposed here has deterrent effects upon the circulation of the press and serves as an abridgment of rights guaranteed by the First Amendment. In safeguarding the freedoms from cruel and unusual punishment under the Eighth Amendment, there is also the guarantee that the freedoms of speech and press protected by the First Amendment will also be preserved. *Roth v. United States*, 354 U.S. 476;

Smith v. California, 361 U.S. 147; *Marcus v. Search Warrants of Property, etc.*, 367 U.S. 717; *Jacobellis v. Ohio*, 378 U.S. 184.

Moreover, the requirement that petitioner Aday furnish $75,000 in cash bail pending appeal was a violation of the excessive bail provisions of the Eighth Amendment and constitutes a manifest abuse of judicial discretion by the trial court. Such a high bail in view of the fact that the petitioner had always obeyed the orders of the trial court and had always made required appearances before the court, and where there was not the slightest evidence that petitioner would not comply with any final judgment of the court, amounted to no more than additional punishment over and above the fines and imprisonment imposed upon petitioner. *United States v. Motlow*, 10 F. 2d 657, 662 (before Mr. Justice Butler of the United States Supreme Court, sitting as Circuit Justice in the Circuit Court of Appeals for the Seventh Circuit, February 1926). See also, *Stack v. Boyle*, 342 U.S. 1.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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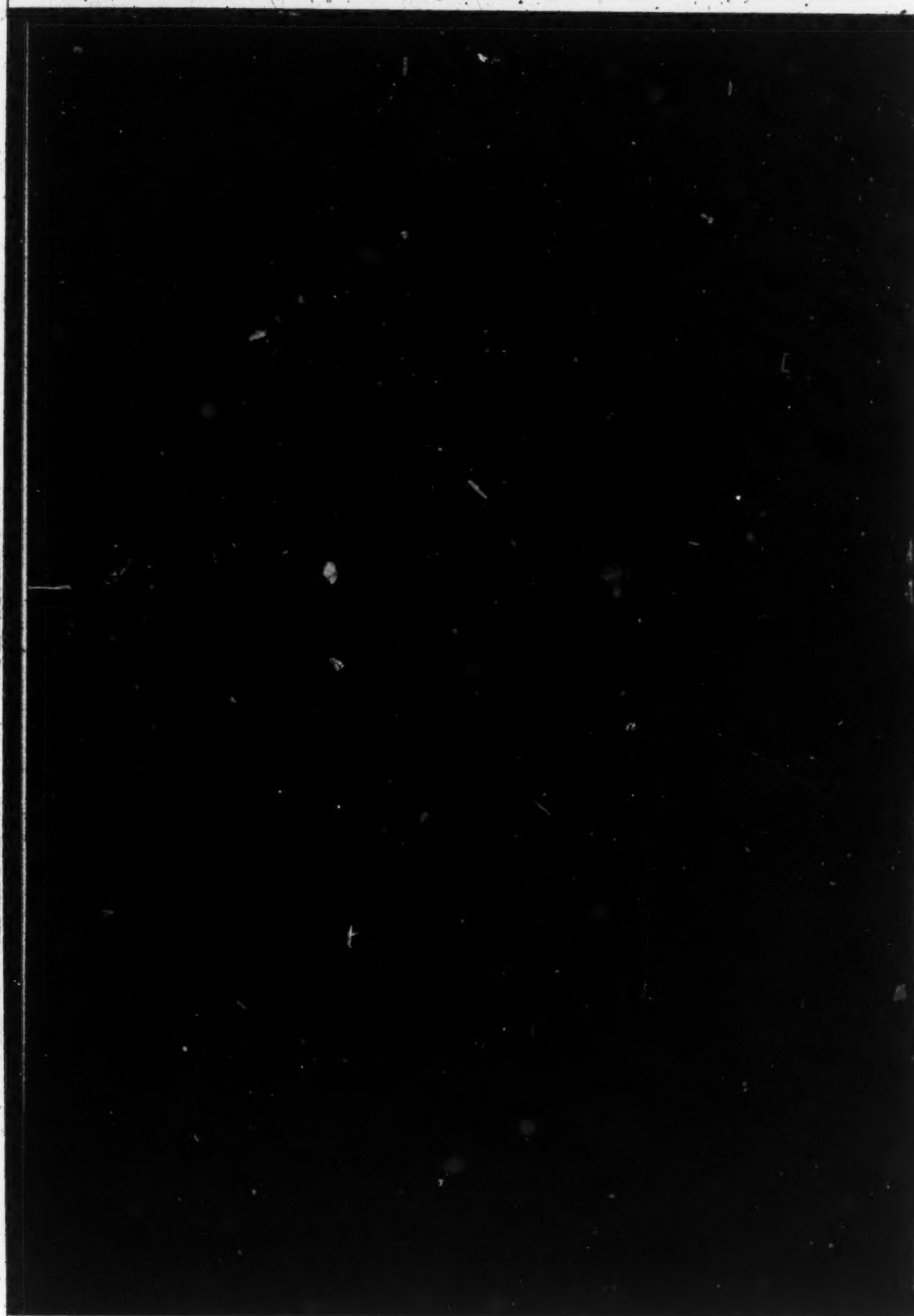

APPENDIX A.

Opinion of the Court of Appeals.

Appeal From the U. S. District Court for the Western District of Michigan.

United States Court of Appeals for the Sixth Circuit.

United States of America, *Plaintiff-Appellee*, v. West Coast News Company, Inc., a California Corporation, Wallace DeOrtega Maxey, and Sanford E. Aday, *Defendants-Appellants*. Nos. 15792, 93, 94, 95.

Filed March 22 1966.

Decided March 22, 1966.

Before Weick, Chief Judge, O'Sullivan, Circuit Judge, and Cecil, Senior Circuit Judge.

O'Sullivan, Circuit Judge. This is an appeal from a judgment entered upon a jury verdict convicting defendants-appellants, West Coast News Company, a California Corporation, and Wallace DeOrtega Maxey and Sanford E. Aday, California residents, of violations of Sections 1461 and 1462, Title 18, U.S.C.A. The charged offenses arose from the delivery into Michigan by mail and common carrier of allegedly obscene books, including one entitled *Sex Life of a Cop*.[1] Trial was in the United States District Court for the Western District of Michigan. Substantial fines were imposed upon the corporate and individual defendants and the latter received severe prison sentences.

Our task is lightened by our view that the challenged book is by any standard obscene. It was inevitable that in today's bold and flourishing business of pornography there would come along a writing so bad that no amount of sophisticated dialectics could absolve it from clas-

[1]The indictment charged that eight books in the shipments were obscene, but the jury disagreed as to all but *Sex Life of a Cop*.

sification as "hard core". Such is the book we deal with. Thus we are spared the burden of attempting our own contribution to the already abundant literature on what is and what is not obscene. Although it was the jury's function to make the final decision as to whether crimes were committed by the commerce in this book, we are put to an initial and independent judgment because of appellants' contention that, as a matter of law, the book is not obscene.

We are properly charged with such responsibility by *Jacobellis v. Ohio*, 378 U.S. 184, 12 L.Ed.(2) 793 (1964), where the United States Supreme Court by footnote reference (p. 188) finds relevant one author's observation that,

> "This obligation—to reach an independent judgment * * * appears fully applicable to findings of obscenity by juries, trial courts, and administrative agencies. The Supreme Court is subject to that obligation *as is every court before whom the constitutional issue is raised.*" (Emphasis supplied)

In making this judgment, we apply the test announced by *Roth v. United States*, 354 U.S. 476, 489, 1 L.Ed. (2) 1498 (1957) and conclude that "to the average person, applying contemporary community standards, the dominant theme of the material [the book *Sex Life of a Cop*] taken as a whole appeals to prurient interest."

We will not attempt illumination by extensive recital of the book's contents. This short description will suffice. *Sex Life of a Cop* is a paperback with a cover picturing a woman (the wife of the Mayor of the town) trying unsuccessfully to hide her nakedness behind the grotesque, underwear-clad figure of the town's Chief of Police, both of them having been interrupted in their

lover's lane dalliance by two of the town's police officers. The latter pair are the heroes of the narrative. Their discovery of the Chief and his lady was not the product of zeal to enforce the law, but of their effort to beguile the monotony of their round of duty by such surprise intrusions.

Inside the covers are pages which the defendants' experts call "blurbs". These are short, but meaty, excerpts from other books available from the publishers, and give prurient promise of the books' contents. They demonstrate that the publisher, at least, suffered from no illusions as to the interests to which the book was directed. One of the blurbs, however, has an intellectual flavor. It identifies as an author, Wallace DeOrtega Maxey, *Doctor of Divinity*, whom we assume to be the defendant of the same name. "Dr. Maxey" is described as a minister who has cast off the shackles of prudery, (now an evangelist for freedom) whose "views are in sharp contrast with those of most other ministers, but so were the views of Columbus with those of the other navigators of his time. The new idea replaces the old; the world is not flat."

The 147 pages of the alleged novel are generously faithful to the promise of the blurbs. Without palliating interruption, the story moves quickly from one sexual enterprise to another. So numerous are these events that even the practiced skill of the authors runs out of fresh imagery and dully repeats his supply of leering adjectives. The chief actors are a police sergeant and his fellow occupant of the appropriately named "prowl car". These officers, except for some needed rest from their amours, devote most of their on-duty and off-duty hours to successful sex encounters with whatever fe-

males come within their view. Their conquests range from a virgin to a "100 dollar" prostitute. The wives of the Chief of Police and the Mayor of the town, the new police dispatcher, friendly waitresses, two nurses who promptly take off their clothes when the busy officers, otherwise unheralded, climb through their open window, a drunken "society" lady who is first rescued from a corner lamppost and then raped in the back seat of the prowl car, and a miscellany of other willing ladies, make up the cast. Every female identified in the story is easy prey for the officiers. With their husbands away, some married ladies gain the officer's sexual services by false night calls to the police dispatcher complaining of a "prowler." Chivalrous response by the prowl car is rewarded by amorous receptions. Even the wife of his fellow officer is not overlooked by Sergeant Thorne. The drama concludes with a smashing *denouement* when the sergeant discovers, as an eyewitness, that his own beloved Alice has been enjoying his outranked, prowl-car-pal's offerings. The moral lesson of retribution, which defendants' experts claim gives this book a social value, subtly emerges in the cuckolded sergeant's plaintive soliloquy "What in the world have I ever done to deserve this?" Thus ends the play.

We cannot believe that the First Amendment's great guarantee of freedom of expression can be elasticized to embrace *Sex Life of a Cop*. We conclude this part of our opinion with imitation of the wise and timesaving succinctness employed by Mr. Justice Potter Stewart in *Jacobellis*. Avoiding agonizing dissertation on the subject of obscenity, he said "I know when I see it and the motion picture involved in this case is not that." May we then, exercising the common sense which we like to

think is a mark of today's federal judges, say that we know hard core pornography when we see it, and *Sex Life of a Cop* is just that. This initial and required judgment on the matter will be our ruling that the United States Constitution was not offended by letting this case go to the jury.

We will discuss such of the other charged errors as we consider merit consideration. Many of these were discussed adequately and at length in opinions of the District Judge, published as *United States v. West Coast News Company*, 216 F. Supp. 911 (W.D. Mich. 1963) and *United States v. West Coast News Company*, 228 F. Supp. 171 (W.D. Mich. 1964). These opinions bring together various rulings made during the course of and after trial. In the main, they are dispositive of the questions before us.

1. Rulings on Defendants' Expert Testimony.

At pretrial, the subject of expert witnesses was discussed. The District Judge announced that he would allow each side to use two. Appellants' counsel requested the use of four. The judge allowed him three. Defendants were to make the selection of which three of their four witnesses they would use. We think the limitation on the use of experts was within the trial judge's discretion. See Annot. 5 A.L.R.(3) 238, 257 § 11. We do not consider that he abused it. See his discussion at 228 F. Supp. 187-191.

The District Judge refused to allow appellants' experts to give their opinion as to whether *Sex Life of a Cop* was obscene. Such was the ultimate issue for the jury's determination. We find no error in this regard. While we have not been cited to any decision squarely on this point, we consider our view supported by respect-

able authority. *United States v. Levin*, 83 F(2) 156, 157 (CA 2, 1936); *Volanski v. United States*, 246 F (2) 842, 844 (CA 6, 1957); *Womack v. United States*, 294 F(2) 204, 206 (CA D.C. 1961), *cert. den.* 365 U.S. 859; *Kahm v. United States*, 300 F(2) 78, 84 (CA 5, 1962) *cert. den.* 369 U.S. 859; *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 NE(2) 840 (1945). And see the District Judge's discussion at 228 F. Supp. 182-191.

Defendants' experts were allowed to express their opinions as to the literary value and social importance of *Sex Life of a Cop*, as well as their views as to its acceptability by "contemporary community standards." The experts were Robert J. Kirsch, literary editor of the Los Angeles Times and part time teacher of "creative writing" at the University of California, Edward L. Galligan, professor of English at Western Michigan University, and one Guy Endore, an author who has lectured at various universities.[2] Among other observations, the witness Kirsch gave the book literary standing as a novel because "it has what I would consider to be the minimal qualities of a novel, it has prose composition that relates incidents in a narrative scenic form, *it has a beginning, middle and an end.*" (Emphasis supplied.) In his view, contemporary community standards will put up with the use of language "of every kind and level" and today's accepted literature treats "in very explicit detail" with "abnormality and perversity of all the

[2]Defendants' fourth expert, excluded under the ruling limiting the number of experts, was Dr. Martha Boaz, Dean of the School of Library Science of the University of Southern California. The offer of her proof asserted that she was prepared to testify that there was nothing in *Sex Life of a Cop* and its accused companions "that would cause her to hesitate to submit them to students to read."

convolutions of sexual activity." Professor Galligan buttressed his assertion that *Sex Life of a Cop* did not offend comtemporary community standards with the profound observation that "the writer wouldn't write about it [sex] unless there is an audience willing to read about it." Exhibiting his expertness, he said that, vis-a-vis today's sex literature, *Sex of a Cop* loses standing because its sexual scenes are "not vivid eniugh." As to the book's literary value, he described it as "a novel of social realism and social criticism, written in the tradition of the picaresque novel" and added that "*for the sort of book that it is,* for its audience, and *for what it is trying to do,* I think it has some real value." (Emphasis supplied.) The author-witness Endore found literary validity in *Sex Life of a Cop* in its exposure of "the methods of the police in this little town" and "the sexual life of the cops." He felt that "anything in the life of people is valid material for a novel." These experts had the view that our national community standards had so deteriorated, or "matured," that *Sex Life of a Cop* did not offend. Social importance was found in the retribution that was visited upon the sergeant by his own wife's infidelity and in the corruption and immorality of all of the actors, police and municipal officials, their wives and every female encountered by the heroes. It is indeed frightening to be aware that traffickers in such a book as we deal with can call to their defense the schoolmen and others with the intellectual eminence claimed by these experts. Were it not for that, we might wonder whether these distinguished experts were not really spoofing us with their elegant esoterica. We may assume, however, that their testimony was expressive of sincere intellectual conviction. We cannot, however, fault the jury for finding unconvincing these experts'

rationalization of the social worth and literary importance of *Sex Life of a Cop*.

A further error charged was the trial judge's refusal to allow defendants' experts either to identify to the jury various books claimed comparable to *Sex Life of a Cop* and which had been found by the United States Supreme Court or other courts not obscene, or to identify other books allegedly accepted by comtemporary community standards. To avoid intolerable flooding of the record the District Judge, correctly in our view, advised appellants' counsel to select a limit of eight books for such use. He admonished that these books could be so used only if it were proven that they were in fact comparable to the books covered by the indictment, and had in fact become acceptable by contemporary community standards. Defense counsel thereupon chose the following eight books: *Fanny Hill, Tropic of Capricorn, Lady Chatterly's Lover, Naked Lunch, Carpetbaggers, Cold Wind in August, Clip Joint Cutie* and *Sin Binge*.

To test the comparability of the first six books, a preliminary voir dire of defendants' experts was conducted out of the presence of the jury. From his evaluation of the experts' characterization of the literary quality of these books and from his reading of them, the District Judge concluded that they were so dissimilar to *Sex Life of a Cop* and its companions as to render them irrelevant and, hence, inadmissible. From our review of the record, we are satisified that such ruling was correct. See *Womack v. United States*, 294 F(2) 204, 206 (CA D.C. 1961), *cert. den.* 365 U.S. 859, and Judge Fox's ample discussion of the point at 228 F. Supp. 191-201.

The government conceded that *Sin Binge* and *Clip Joint Cutie* were similar to the challenged books. They were denied admission, however, for lack of proof that they had become acceptable by community standards. We consider such ruling correct, as was the trial judge's refusal to admit a flood of other material solely on the claim that books of the same general trend, embellished with like "blurbs," could be found on the shelves of many book stores and news racks. See *People v. Finkelstein,* 11 N.Y.(2) 300, 229 N.Y.S.(2) 367, 183 N.E. (2) 661, *cert. den.* 371 U.S. 863, 9 L.Ed.(2) 100 (1962). We are not persuaded that the establishment of a fait accompli by the purveyors of pornography is proof that they have already succeeded in destroying every remaining standard of our contemporary society. Nor has that society endowed these men with the right to establish our standards. License to continue does not follow each victory in spreading obscenity.[8] See *United States v. Oakley,* 290 F(2) 517, 519 (CA 6, 1961), *cert. den.* 368 U.S. 888, *rehearing den.* 368 U.S. 936.

In approving the rulings of the District Judge on appellant's use of expert testimony, we are not unmindful of the relevant observations of Justices Frankfurter and Harlan in their concurring opinions in *Smith v. California,* 361 U.S. 147, 164, 165, 172 (1959). We do not content ourselves by saying that those concurrences did not necessarily express the majority view, but are agreed that what the District Judge did in this case does

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[8]The proportions of these victories for pornography are illustrated by defendants' chief counsel's offer to put in evidence a miscellany of books which are "illustrative of literally thousands of like books which have been put on the market over the last three or four years; that these books have covers and blurbs which are sexually far more candid than any of the covers or blurbs involved in the case herein; that all of these books are distributed nationally, that is to say virtually in every state in the Union."

not offend the views of those distinguished Justices. We consider that their suggestions of a legitimate range of admissible expert testimony were satisfied by what the experts here were allowed to tell the jury.

2. Motion for Change of Venue.

Appellants moved, under Rule 21, Fed. R. Crim. P., to transfer the involved proceedings to California. The charged offenses encompassed the transportation of the allegedly obscene material from Fresno, California, appellants' base of operations, into four cities in Michigan, 18 U.S.C.A. §§ 1461, 1462. They complained of the hardships involved in standing trial so far from their homes, with the attendant expense of bringing witnesses and counsel to present their defense. The individual defendants averred that in California they had witnesses "who could testify to their reputation for truth and good moral character."[4] The motion was initially heard and denied by District Judge Raymond Starr whose opinion is reported as *United States v. West Coast News Company*, 30 F.R.D. 13, (W.D. Mich. 1962). We consider Judge Starr's opinion a quite adequate exposition of the rule that the involved motion was addressed to the discretion of the District Judge and a clear demonstration that his discretion was

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[4]The government's appendix includes the following recital of the content of the presentence report before the District Judge:

"The prior record of Aday . . . included a past state conviction for pimping and pandering. The pandering count involved 'the placing of a nineteen year old married woman and a mother, the wife of a serviceman, in a house of prostitution' and the pimping count involved taking prostitutes to labor camps where he would wait outside the bunkhouses and take the money from them as they emerged."

As to Maxey, the appendix avers that "The prior record of appellant Maxey * * * included a record of homosexuality and two arrests for soliciting and committing homosexual acts in public."

soundly exercised. It will appear that Judge Starr expressed a view that the "community standards" of *Roth* would in this case be those of jurors from the Michigan community. His opinion came down February 13, 1962, before *Manual Enterprises v. Day,* 370 U.S. 478, 488 on June 25, 1962, and *Jacobellis v. Ohio,* 378 U.S. 184, 193, 194, 195, on June 22, 1964, determined that the involved "community" was the entire nation. Following *Manual,* defendants renewed their motion for transfer of the trial to California, asserting the *Manual* destroyed the validity of the reasons given by Judge Starr in denying the motion. This renewed motion was also supported by new affidavits averring additional hardships in standing trial in Michigan. Judge Fox denied this second motion and this denial was not bottomed upon an erroneous view of the "community standards" that would apply. We assume that Judge Fox considered the entire thrust of appellants' motion and exercised his discretion by denying it. The indictment charged that crimes were committed in Michigan. Appellants had no constitutional right to be tried in their "home" state even though the crimes charged were committed there as well as in the State of Michigan where they chose to do business. *Platt v. Minnesota Mining Co.,* 376 U.S. 240, 245 (1964). We think that upon this appellate review, the question is "were these defendants deprived of a fair trial as a result of the denial?" *United States v. Aronson,* 319 F(2) 48, 52 (CA 2, 1963), *cert. den.* 375 U.S. 920, *rehearing den.* 375 U.S. 982. In our view, they were not. Whatever their early fears, they were able to provide an array of expert witnesses from California as well as Michigan and their defense was vigorously presented by them-

selves and California lawyers highly skilled in defense of obscenity cases, with the assistance of local counsel.

3. Presentation of the Accused Books to the Jury.

The government requested that the accused books be taken and read by the jury in the jury room. The defense requested that each book be read to the jury *viva voce* in open court. The District Judge ruled that the books be read individually by the jurors in open court with the judge, a court reporter and all counsel present. We find no fault with the plan adopted. The District Judge's reasons for such discretionary choice are adequately and well articulated in his opinion at 228 Supp. 175-179.

4. The District Judge's Instructions.

A specific criticism was the District Judge's refusal to tell the jury that in addition to proving that defendants knew the contents of the accused books, it was the government's burden to prove that the individual defendants also knew that such contents were in fact obscene. The Court refused to charge that: "If you believe that defendants were honestly ignorant of the 'obscenity' of the books, if you should find they were obscene, then the defendants should be acquitted." The Court did tell the jury:

> "Therefore, before you may convict, in addition to finding a book is obscene, you must find * * * as to each defendant that he knew the contents of the book and knowingly caused it to be mailed or so carried here."

and, further, that:

> "If a defendant was honestly mistaken as to the contents of any book or books, or if he had no

knowledge of the contents of any book or books, or if you have a reasonable doubt as to such defendant's knowledge of the contents of any book or books, then as to such defendant * * * you must find the defendant not guilty."

In the context of this case and our above expressed view of the obvious obscenity of *Sex Life of a Cop*, we find no reversible error in the Court's refusal of the proffered request. *Rosen v. United States*, 161 U.S. 29, 41-2 (1896); *Kahm v. United States*, 300 F(2) 78, 86 (CA 5, 1962), *cert. den.* 369 U.S. 859; *United States v. Oakley*, 290 F(2) 517, 519 (CA 6, 1961) *cert. den.* 368 U.S. 888, *rehearing den.* 368 U.S. 936. In *Rosen*, the Supreme Court said:

> "Everyone who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity and chastity in social life, and what must be deemed obscene, lewd and lascivious." 161 U.S. at page 42.

and the Court was thereby finding without error refusal to give a request substantially the same as the one here refused. Notwithstanding the expanding liberality that has followed *Rosen* the above quote was appended without criticism as footnote 28 to *Roth v. United States*, 354 U.S. 476, 491.

Appellants make numerous other charges of error in the instructions that the District Judge did give and in his refusal of others proffered by appellants. Appellants' counsel initially submitted ninety-nine requests to charge and at the end of the trial submitted twenty-nine more. Such inundation of a trial judge, with the obvious hope

that the created confusion will lead him to error, is questionable practice. *United States v. Olweiss,* 138 F(2) 798, 800 (CA 2, 1943); *Bateman v. United States,* 212 F(2) 61, 69 (CA 9, 1954).

We will not attempt detailed discussion of the District Judge's charge to the jury. Suffice it to say that his instructions followed the guidelines of *Roth* and *Jacobellis* and adequately presented the applicable rules of law. We find in it no errors or insufficiences that adversely affected any substantial rights of the appellants. Fed. R. Crim. P. Rule 52.

5. Challenge to Grand Jury Array.

Defendants were arraigned on March 2, 1962, and pleaded not guilty. On March 27, 1962, they moved to dismiss the indictment on the ground that the grand jury which had returned the indictment had been improperly composed. Such motion came a year and ten months after the indictment had been returned. Between then and the arraignment, extensive procedural steps had been taken by defendants. The District Judge conducted a hearing at which defendants presented evidence in support of the motion. He denied it on two grounds: first, that the motion was untimely and the objection had been waived and, second, that it was unmeritorious. His opinion on the matter is set out at 216 F. Supp. 911, 914-21 (D.C. W.D. Mich., 1963).

We consider that the District Judge correctly ruled that defendants' delay was, in the absence of excuse or explanation, sufficient to render the motion untimely. In *Scales v. United States,* 367 U.S. 203, 259, the Supreme Court affirmed the holding of the Fourth Circuit which, in *Scales v. United States,* 260 F(2) 21, 46 (1958)

had said, with reference to a ruling substantially like the one here,

> "The ruling was entirely justified under the terms of Rule 12 [F.R. Crim. P.] as interpreted by the authorities. The information on which the motion was based was at all times available to defendant and yet he failed to take action despite liberal extensions of time."

The Fourth Circuit there cited *Agnew v. United States*, 165 U.S. 36, 44 (1897), to support its ruling, as did the District Judge here.

The denial of the motion on its merits was also without fault. We need not detail what the evidence disclosed as to the method employed by the Western District of Michigan in obtaning names for jury service, other than to mention that the "Suggester" or "Key Man" system was used. No prejudice to defendants, or constitutional deprivation was disclosed by the evidence. See *United States v. Hoffa*, 349 F(2) 20, 29-30 (CA 6, 1965).

6. Constitutionality of Amended Statutes.

Appellants contend that 1958 amendments to §§ 1461, 1462 which permit prosecution at the place of delivery as well as at the point of origin, are unconstitutional. The writer expressed a contrary view in *United States v. Frew*, 187 F. Supp. 500, 507 (E.D. Mich. 1960). We find no constitutional fault in the statutes as amended. Appellants further suggest that in view of the decisions that have followed *Roth* and because of the replacement of some of the Justices who made up the majority in that case, *Roth* is of doubtful value as a precedent. Indeed, the American Civil Liberties Union, in its amicus

brief, intimates that we should now narrow the restrictions announced by *Roth*. ACLU says:

> "The teaching of *Roth* that material loses the protection of the Constitution if it can be called 'obscene' has bred more confusion than it has allayed."

and adds that the difficulty of obtaining an "authoritative consensus" from the Supreme Court in the cases that have followed *Roth* underlines, in the view of the ACLU, "the bankruptcy and inadequacy of the formulation in *Roth*."

We read all of this to mean that the time has now come to remove whatever restraints are still available to the government to impede the progress of the business we deal with. We have neither the right nor the inclination to seek a way around *Roth*.

7. Other Matters.

We have considered other contentions of appellants and find them without merit.

8. The Sentences.

Defendants, Aday, Maxey and West Coast News Company, Inc., were each found guilty under Counts 6, 10, 12, 13 and 14 of the indictment. The charge in Count 6 was the use of the *mails* to effect the carriage and delivery of copies of *Sex Life of a Cop* from Fresno, California, to Battle Creek, Michigan, on or about August 24, 1959, in violation of 18 U.S.C.A. § 1461. Counts 10, 12, 13 and 14 involved the use of a *common carrier* to effect like transportation to the Michigan cities of Kalamazoo, Grand Rapids, Kalamazoo and Muskegon on the respective dates of September 30, August 4, August 6, and August 4, 1959, all in violation of 18 U.S.C.A. § 1462. These statutes permit im-

position of a prison sentence of not more than five years and of a fine of not more than $5,000. Defendant Aday received the maximum under each count, five years imprisonment and a $5,000 fine, cumulated to a total of 25 years imprisonment and a fine of $25,000. Defendant Maxey received a prison sentence of five years on each of counts 6 and 10, two years on each of counts 12 and 13, and 1 year on count 14, cumulated to 15 years; he was fined $5,000 on each of counts 6 and 10, $2,000 on each of counts 12 and 13 and $5,000 on count 14, cumulated to a total of $19,000. The Corporation received the maximum fine of $5,000 on each of the five counts, cumulated to a total of $25,000. The prison sentences on Aday and Maxey were made subject to 18 U.S.C.A. § 4208(a)(2), with the specification that the prisoners would "become eligible for parole at such time as the Board of Parole may determine."

Appellants charge that because of their proximity in time and place the shipments constituted but one offense; that if the statutes can be construed to permit the consecutive sentences imposed here, such statutes and the sentences offend the United States Constitution's Eighth Amendment proscription of cruel and inhuman punishment.

We do not agree with the contention that the several shipments which violated § 1462 constituted but one offense. We do, however, express our view that less severe sentences would have been a more discreet exercise of the District Judge's authority. In *Beckett v. United States,* 84 F(2) 731, 732, 733 (CA 6, 1936) we adhered to the rule that appellate courts are generally "powerless to intervene" to change a District Judge's choice of sentence. Judge Simons there said "the dis-

cretion conferred by them [the statutes there involved] in respect to sentence is one vested in the sentencing judge and not in a reviewing court." He also considered that it was not illegal to impose consecutive sentences for offenses which might be viewed as components of a course of conduct, but of such practice he said, "caution and moderation must rule its exercise." We have adhered to the rule of *Beckett* in our later holdings. *Livers v. United States,* 185 F(2) 807 (CA 6, 1950); *Costner v. United States,* 271 F(2) 261 (CA 6, 1959); *United States v. McGuire,* 328 F(2) 303 (CA 6, 1964); *United States v. Gargano,* 338 F(2) 893 (CA 6, 1964). We have, as is true of other courts, often taken occasion to say that the discretion which we held belonged to the sentencing judge had not, in the case then before us, been abused.

In *Yates v. United States,* 356 U.S. 363, 367 (1958) and in *United States v. United Mine Workers,* 330 U.S. 258, 304 (1947), the Supreme Court reduced in the one a prison sentence, and in the other a fine. Both of these, however, involved punishment for criminal contempt. In *Brown v. United States,* 359 U.S. 41, 52 (1959) the Court indicated that the power there exercised was peculiar to contempt cases, saying,

> "Because there is no statutory limit upon a District Court's sentencing power in cases of criminal contempt, *Green v. United States,* 356 U.S. 165, this Court is not without power to review its exericse." *Cf. Yates v. United States,* 356 U.S. 365; *Nilva v. United States,* 352 U.S. 385, 386.

In its first remand of *Yates,* the Supreme Court expressed its view of the necessity "of having the trial judge reconsider the sentence *in the cool reflection of*

subsequent events." (Emphasis supplied.) *Yates v. United States,* 335 U.S. 66, 76 (1957). Perhaps the District Judge here may accept as a relevant "subsequent event" the thoughts we now express. The Seventh Circuit in its two decisions of *United States v. Wiley,* 267 F(2) 453 (1959) and *United States v. Wiley,* 278 F(2) 500 (1960), twice vacated an imposed prison sentence primarily because of its disapproval of a District Court practice of refusing to consider probation for an accused who stood trial rather than plead guilty. These cases can be read as holding that we have the power to set aside or reduce the severity of a sentence as an exercise of a federal appellate court's "supervisory power over the administration of justice of the lower courts." *Yates v. United States,* 356 U.S. 363, 366, 367. A distinguished member of the Tenth Circuit, albeit as a dissenter, would read the broad language of 18 U.S.C.A. Section 2106 as giving appellate courts the right to modify, by reduction, a District Court sentence. *Smith v. United States,* 273 F(2) 462, 468, 469 (CA 10, 1959). We have in mind, also, that all doubts as to appellate power in this regard may be shortly resolved if the Congress adopts presently proposed legislation which would provide federal appellate courts clear and broad powers in this field.

We applaud and share the desire of the learned District Judge in this case to strike at and slow down the ever-increasing velocity of today's commerce in obscenity. The characters of defendants Aday and Maxey as shown by their earlier criminal conduct give little support to a plea for moderation. It may indeed be that each of them has already "exhausted his balance with fate." On the other hand, while we think that the mailing which violated Section 1461 calls for separate punish-

ment, we are unable to avoid looking upon the offenses which violated Section 1462 as so similar in time and place that they would be adequately punished if the five year or lesser terms under these counts be made to run concurrently, but consecutive to the five year sentence under the Section 1461 count. Thus, neither defendant could receive any greater prison sentence than 10 years. We think, too, that it would be appropriate for the District Judge to continue his disparate treatment of the defendants by reducing the Maxey sentence under § 1462 to something less than that imposed upon Aday. We are not unmindful that 18 U.S.C.A. § 4208 (a) (2) would permit the parole authorities to shorten the time to be served under any sentence, but believe that the courts should, by their initial choice, fix its limits. We suggest no change in the fines imposed. It is a fair inference that the big business we deal with can well afford them.

Upon a mandate going down on the affirmance of the conviction of these defendants, it will be within the power of the District Judge under Rule 35 of the Federal Rules of Criminal Procedure to reduce the prison sentences imposed. He can do this *sua sponte* without command from us or motion by defendants. Because of this, we need not now announce whether we consider that the District Judge abused his discretion in imposing the involved sentences, whether we consider that today's law permits us to change such sentences, or whether we consider that the sentences imposed by the District Judge offend the Eighth Amendment proscription of cruel and inhuman punishment. There will be time enough for us to further consider the matter should the District Judge conclude not to adopt our suggestion as to reduction of the sentences.

This may indeed be a pragmatic handling of these difficult questions, and with great respect for the District Judge's earlier views, we hope that he will find it discreet to follow our thoughts, born of more opportunity for reflection than was available to him. This litigation has long pended and should be terminated.

We affirm the judgment of conviction and remand the cause to the District Court for its reconsideration of the prison sentences in the light of this opinion.

APPENDIX B.

Opinion of the Court of Appeals (Mandamus Proceedings.)

Sanford E. Aday, Wallace De Oretga Maxey, and West Coast News Company, Inc., a California corporation, Petitioners v. United States District Court for the Western District of Michigan, Southern Division, and Noel P. Fox, Judge of the United States District Court for the Western District of Michigan, Southern Division, Respondents.

No. 15381.
United States Court of Appeals
Sixth Circuit.
June 12, 1963.

Stanley Fleishman, Hollywood, Cal., for petitioners.

Herbert J. Miller, Jr., Asst. Atty. Gen., Criminal Div., Dept. of Justice, Washington, D. C., George E. Hill, U. S. Atty., Grand Rapids, Mich., for respondents.

Before Cecil, Chief Judge, and Weick and O'Sullivan, Circuit Judges.

Order.

This cause is before the Court on a petition by Sanford E. Aday, Wallace De Ortega Maxey, and the West Coast News Company, Inc., for a writ of mandamus against the United States District Court for the Western District of Michigan, Southern Division, and Noel P. Fox, District Judge. Petitioners have also submitted an application for a stay of further proceedings in the District Court for the Western District of Michigan pending determination of the petition for writ of mandamus.

The record discloses the following proceedings in the District Court: The petitioners were indicted on May 24, 1960, by a federal grand jury in the Western District of Michigan, for use of the mails for the delivery of obscene materials. Counts 1 through 6 of the indictment charged that the mails were used to deliver certain obscene, lewd and indecent books into the district, in violation of Sec. 1461, Title 18 U.S.C. Counts 7 through 19 charged that the defendants used a common carrier in interstate transportation to deliver certain obscene, lewd and indecent books into the district, in violation of Sec. 1462, Title 18 U.S.C.

On August 15, 1960, the defendants filed a motion pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, seeking to transfer this criminal proceeding from the Western District of Michigan to the Southern District of California. A hearing was held on the motion and arguments were presented by counsel. At the hearing Judge Starr ordered that any further motions were to be filed before September 30th. The defendants' motion to transfer the action to the Southern District of California was denied on February 13, 1962, by Judge Starr. (The opinion is reported at D.C., 30 F.R.D. 13.)

On March 2, 1962, the defendants were arraigned before Judge Starr. At that time Judge Starr granted thirty days in which to file any and all motions. On March 30, 1962, the defendants filed a motion to dismiss the indictment alleging that the grand jury was not legally constituted. A motion was also filed to dismiss the indictment because of an alleged unconstitutional application of the statutory law controlling the use of the mails. A motion for a bill of particulars was also filed at that time.

The United States filed on March 12, 1963, a motion to strike the motion to dismiss the indictment filed by the defendants which challenged the array of the grand jury. The government's motion asserted that the challenges to the array and the indictment were not *timely* made and, therefore, the defendants had waived their right to challenge the array of the grand jury.

On March 13, 14 and 15, 1963, a hearing was held before Judge Fox on the motion challenging the array of the grand jury. The District Court took testimony, oral and documentary, in support of the claim that the grand jury which returned the indictment was illegally constituted. This testimony was taken subject to the court's reservation of the *waiver* issue. At the conclusion of the hearing, the District Court allowed 45 days to file briefs on all issue involved in the different motions before the court.

On March 22, 1963, one week after the conclusion of the hearing on the motion challenging the array of the grand jury, Judge Fox called a pre-trial conference. He advised counsel that he was prepared to rule on all pending motions before the court. Accordingly, the 45-day period for filing briefs was rescinded. The court had, at that date, determined that the defendants had waived a challenge to the array of the grand jury. An order denying all motions was entered March 29, 1963.

Judge Fox's formal opinion denying all the defendants' motions was filed on April 18, 1963. The ruling that the defendants had waived their rights to challenge the array of the grand jury is the crux of this mandamus proceeding.

Judge Fox ruled that Judge Starr's announcement at the arraignment, granting 30 days in which to file all

motions, was directed to all pre-trial motions and not to all pre-arraignment motions. "Motions to the competency of the Grand Jury or to the sufficiency of the indictment or information, are prearraignment motions. Federal Rules of Criminal Procedure, Rule 12(b)(3)." Opinion reported at 216 F. Supp. 911.

"Defendants delayed filing the motion to dismiss the indictment on their challenge to the array until March 27, 1962, one year, ten months and three days after the return of the indictment against them * * *," id, 216 F.Supp. at 915. Relying on Agnew v. United States, 165 U.S. 36, 17 S.Ct. 235, 41 L. Ed. 624, Judge Fox determined that in the present case the defendants had "abundant opportunity to object to the competency of the Grand Jury before the indictment was found, and certainly much sooner than [they] did after indictment was returned," id., 216 F.Supp. at 916-917. "Neither Rule 6 nor Rule 12 of the Federal Rules of Criminal Procedure changes the intent and purpose of the rule of the Agnew case, excepting, however, the rules do give the court the power for *good cause shown*, to grant relief from a waiver," id., 216 F.Supp. at 917.

"Also, defendants' motion to transfer the case to the Southern District of California constitutes an implied waiver to any challenge to the array or the indictment," id., 216 F.Supp. at 918. "The whole thrust of the motion to transfer is that the indictment is good and defendants are ready to proceed to trial," id., 216 F.Supp. at 918.

"Thus, by every conceivable norm of judgment, both motions challenging the grand jury's competency and the indictment are untimely. An examination of the proceedings as a whole, to this point, clearly impresses

these motions with a badge of studied dilatory tactics," id., 216 F.Supp. at 920.

"For purposes of thoroughness, the court feels it proper to here state in its opinion that the attack on the array, on its merits, is not well taken. * * * and I find as a matter of fact that the defendants have failed to meet their burden of proof," id., 216 F. Supp. at 921.

The defendants had filed on December 3, 1962, a motion for renewal and reargument of the motion to transfer pursuant to Rule 21(b). On April 18, 1963, Judge Fox denied this motion in his "omnibus" opinion. Then on April 26, 1963, the petitioners filed in the United States Supreme Court, Miscellaneous Docket, No. 1426, a motion for leave to file a petition for writ of mandamus, and a petition for writ of mandamus, seeking to vacate the order of the District Court below which denied the transfer of proceedings to California. This mandamus proceeding is still pending in the Supreme Court. (This petition was denied June 17, 1963. See 373 U.S. ....., 83 S.Ct. 1921.)

On April 29, 1963, the petitioners filed a petition seeking a writ of mandamus in the Court of Appeals for the Sixth Circuit. This writ of mandamus is sought under the All Writs Statute, Sec. 1651 (a), Title 28 U.S.C., and Rule 29 of this Court. An accompanying brief in support of the petition for writ of mandamus was filed. The petition seeks to vacate the order of the District Court which struck the motion to dismiss the indictment, challenging the array of the grand jury. The petitioners also seek to have the order vacated which set the action for trial on June 17, 1963.

The petitioners claim that unless the trial is stayed they will be irreparably injured and deprived of their constitutional rights. Petitioners assert that the motions to dismiss the indictment were made diligently within the prescribed time limitations and in strict compliance with the Federal Rules of Criminal Procedure and by express leave of now Senior District Judge Starr. They claim that no challenge to the array before indictment is required under the present Rules of Criminal Procedure. They contend that the record shows that there was no express or implied waiver of the petitioners' objections to the indictment. Finally, they contend that the case on the merits of the grand jury array was not completed and, accordingly, the district judge was in error in ruling as he did.

On May 16, 1963, the petitioners moved in the District Court for an order staying the trial of the action. This motion was denied by Judge Fox on May 28, 1963. However, the trial was continued for one week, from June 17, 1963 to June 24, 1963.

On May 31, 1963, the defendants applied to this Court for a stay of the trial of this case scheduled to commence June 17, 1963, pending determination of the petition for writ of mandamus. (That date has been changed to June 24, 1963.) The grounds asserted in seeking the stay are: (1) the pending mandamus proceeding seeking transfer now pending before the United States Supreme Court; (2) the mandamus proceeding challenging array of the grand jury now before the Court of Appeals for the Sixth Circuit; (3) the petitioners will be irreparably injured and deprived of their constitutional rights unless the trial of the action is stayed; (4) the indictment does not inform the peti-

tioners as to what is the relevant community in determining whether the books are obscene. On June 10, 1963, the United States answered these contentions in a memorandum in opposition to the application for a stay of trial.

Mandamus is an extraordinary remedy. The issuance of a writ of mandamus against a judge is reserved for really extraordinary causes. Mandamus cannot be used as a substitute for appeal. Roche v. Evaporated Milk Association, 319 U.S. 21, 26, 63 S.Ct. 938, 87 L.Ed. 1185; Parr v. United States, 351 U.S. 513, 520-521, 76 S.Ct. 912, 100 L.Ed. 1377; Ex parte Fahey, 332 U.S. 258, 259-260, 67 S.Ct. 1558, 91 L.Ed. 2041; Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 382-385, 74 S.Ct. 145, 98 L.Ed. 106; Beneke v. Weick, 275 F.2d 38, 39-40, C.A.6; Regec v. Thornton, 275 F. 2d 801, 802, C.A. 6; Massey-Harris-Ferguson v. Boyd, 242 F. 2d 800, 803, C.A. 6, cert. denied, 355 U.S. 806, 78 S.Ct. 48, 2 L.Ed. 2d 50.

This Court will not decide the questions involved at this juncture of the proceedings, nor grant an interlocutory appeal on the questions here presented in the petition for mandamus. There can be no appeal until there is a final adjudication of the case on its merits in the District Court. This case is not such as to require the use of the extraordinary writ of mandamus.

It is ordered that the petition for mandamus be and it is hereby dismissed and it is further ordered that the motion for stay of further proceedings be and it is hereby denied.

APPENDIX C.

Judgment of the Court of Appeals (West Coast News Company, Inc.)

United States Court of Appeals for the Sixth Circuit.

United States of America, Plaintiff-Appellee, vs. West Coast News Company, Inc., a California Corporation, Defendant-Appellant. No. 15,792.

Filed: March 22, 1966.

Before: Weick, Chief Judge, O'Sullivan, Circuit Judge, and Cecil, Senior Circuit Judge.

JUDGMENT

Appeal from the United States District Court for the Western District of Michigan.

This Cause came on to be heard on the record from the United States District Court for the Western District of Michigan and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed and the cause remanded for further proceedings in conformity with the opinion.

No costs awarded. Rule 23(4).

Entered by order of the Court.

/s/ CARL W. REUSS.

APPENDIX D.

Judgment of the Court of Appeals (Maxey.)

United States Court of Appeals for the Sixth Circuit.

United States of America, Plaintiff-Appellee, vs. Wallace De Ortega Maxey, Defendant-Appellant. No. 15,793.

Filed: March 22, 1966.

Before: Weick, Chief Judge, O'Sullivan, Circuit Judge, and Cecil, Senior Circuit Judge.

JUDGMENT

Appeal from the United States District Court for the Western District of Michigan.

This Cause came on to be heard on the record from the United States District Court for the Western District of Michigan and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed and the cause remanded for further proceedings in conformity with the opinion.

No costs awarded. Rule 23(4).

Entered by order of the Court.

/s/ CARL W. REUSS,
Clerk.

APPENDIX E.

Judgment of the Court of Appeals (Aday).

United States Court of Appeals for the Sixth Circuit.

United States of America, Plaintiff-Appellee, vs. Sanford E. Aday, Defendant-Appellant. No. 15,794.

Filed: March 22, 1966.

Before: Weick, Chief Judge, O'Sullivan, Circuit Judge, and Cecil, Senior Circuit Judge.

JUDGMENT

Appeal from the United States District Court for the Western District of Michigan.

This Cause came on to be heard on the record from the United States District Court for the Western District of Michigan and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed and the cause remanded for further proceedings in conformity with the opinion.

No costs awarded. Rule 23(4).

Entered by order of the Court.

/s/ CARL W. REUSS,
Clerk.

APPENDIX F.

Judgment of the Court of Appeals (Aday).

United States Court of Appeals for the Sixth Circuit.

United States of America, Plaintiff-Appellee vs. Sanford E. Aday, Defendant-Appellant. No. 15-795.

Filed: March 22, 1966.

Before: Weick, Chief Judge, O'Sullivan, Circuit Judge, and Cecil, Senior Circuit Judge.

JUDGMENT

Appeal from the United States District Court for the Western District of Michigan.

This Cause came on to be heard on the record from the United States District Court for the Western District of Michigan and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed and the cause remanded for further proceedings in conformity with the opinion.

No costs awarded. Rule 23(4).

Entered by order of the Court.

/s/ CARL W. REUSS,
Clerk.

APPENDIX G.

Order of Court of Appeals Authorizing Reduction of Sentences.

United States Court of Appeals for the Sixth Circuit.

United States of America, Plaintiff-Appellee, v. West Coast News Company, Inc. a California Corporation, Wallace DeOrtega Maxey, and Sanford E. Aday, Defendants-appellants. Nos. 15792, 93, 94, 95.

Filed: April 5, 1966.

Before Weick, Chief Judge, O'Sullivan, Circuit Judge, and Cecil, Senior Circuit Judge.

ORDER

It appearing that the District Court for the Western District of Michigan desires to reduce the sentences imposed in the above cases in the light of the opinion of this Court heretofore filed, and upon consideration.

It Is Ordered that the Clerk of this Court forthwith issue a mandate to the said District Court authorizing that Court to reduce the sentences imposed upon the above defendants and to certify his proceedings to this Court; and that the entry of this order shall constitute the mandate hereby ordered, and the Clerk of this Court shall forward a copy hereof to the said District Court.

Entered by order of the Court.

/s/ CARL W. REUSS,
Clerk.

APPENDIX H.

Order of District Court Reducing Sentences.

United States of America, in the District Court of the United States, for the Western District of Michigan, Southern Division.

United States of America, Plaintiff, v. West Coast News Company, Inc., a California corporation, Sanford E. Aday and Wallace de Ortega Maxey, Defendants. Criminal No. 6615.

Filed: April 6, 1966. (District Court)
Filed: April 11, 1966. (Court of Appeals)

ORDER

Pursuant to a session of said Court held in and for said District and Division, at the City of Grand Rapids, this 6th day of April, 1966.

Present: Honorable Noel P. Fox, District Judge.

Under Rule 35 of the Federal Rules of Criminal Procedure, this District Judge is authorized, *sua sponte*, to reduce the prison sentences imposed on defendants Sanford E. Aday and Wallace de Ortega Maxey on December 30, 1963, in the case of United States of America v. West Coast News Company, Inc., a California corporation, Sanford E. Aday, and Wallace de Ortega Maxey.

Rule 35 reactivates the District Judge's jurisdiction for this limited purpose, "* * * within 60 days after receipt by the court of a mandate issued upon affirmance of the appeal, * * *."

Having received a mandate and having fully considered the opinion of the Sixth Circuit Court of Appeals in the above-entitled case, it is the present judgment of this District Court Judge:

That the sentence heretofore imposed on Sanford E. Aday be, and hereby is amended by striking the statement in said sentence reading:

"The sentences imposed on Counts 6, 10, 12, 13 and 14 are to run consecutively and not concurrently," and substituting in its place the statement:

"The sentences imposed on Counts 10, 12, 13 and 14 are to run concurrently, but consecutively with that imposed on Count 6."

Thus, the net effect is to name a maximum sentence of ten (10) years, under the provisions of Section 4208(a)(2), known as the "indeterminate sentence."

The sentence heretofore imposed on Sanford E. Aday by this court, otherwise, and in every particular, remains in full force and effect.

As to defendant Wallace de Ortega Maxey, it is the judgment of this court that the sentence heretofore imposed on him, be and hereby is amended by striking the statement in said sentence which reads:

"The sentences imposed on Counts 6, 10, 12, 13 and 14 are to run consecutively and not concurrently,"

and substituting in its place the statement:

"The sentences imposed on Counts 6, 10, 12, 13 and 14 are to run concurrently."

Thus, the net effect is to name a maximum sentence of five (5) years, under the provisions of Section 4208(a)(2), known as the "indeterminate sentence."

The sentence heretofore imposed on Wallace de Ortega Maxey by this court, otherwise, and in every particular, remains in full force and effect.

Further, Rule 43 of the Federal Rules of Criminal Procedure provides: "The defendant's presence is not required at a reduction of sentence under Rule 35."

Therefore, defendants Sanford E. Aday and Wallace de Ortega Maxey are represented at this session of the District Court for the reduction of their sentences by their local attorney, George Cook.

By a document filed this day with the court, Sanford E. Aday and Stanley Fleishman, California general counsel for both defendants, have waived their appearance at these proceedings. This document further represents that Mr. Fleishman, acting as counsel for Wallace de Ortega Maxey, also waives Mr. Maxey's appearance.

It Is So Ordered.

/s/ NOEL P. FOX,
District Judge.

APPENDIX I.

Order of Court of Appeals Approving Reduction of Sentences and Affirming Judgments.

United States Court of Appeals for the Sixth Circuit.

United States of America, Plaintiff-appellee, v. West Coast News Company, Inc., a California Corporation, Wallace DeOrtega Maxey, and Sandford E. Aday, Defendants-appellants. Nos. 15792, 93, 94, 95.

Filed: April 21, 1966.

Before Weick, Chief Judge, O'Sullivan, Circuit Judge, and Cecil, Senior Circuit Judge.

ORDER

On March 22, 1966, this Court announced its opinion in this cause affirming the judgments of conviction, but remanding the cause to the District Court for its reconsideration of the prison sentences imposed upon defendants Aday and Maxey. Upon advice that the District Judge desired to reduce said prison sentences, this Court on April 5, 1966, issued its mandate returning the cause to the District Court for such purpose. The said District Court has now certified to this Court that the judgments heretofore entered in this cause have been amended so that as to defendant Aday,

> "The sentences imposed on Counts 10, 12, 13 and 14 are to run concurrently, but consecutively with that imposed on Count 6.
>
> "Thus, the net effect is to name a maximum sentence of ten (10) years, under the provisions of Section 4208(a)(2), known as the 'indeterminate sentence.'

"The sentence heretofore imposed on Sanford E. Aday by this court, otherwise, and in every particular, remains in full force and effect."

and as to defendant Maxey,

"The sentences imposed on Counts 6, 10, 12 13 and 14 are to run concurrently.

"Thus, the net effect is to name a maximum sentence of five (5) years, under the provisions of Section 4208(a)(2), known as the 'indeterminate sentence.'

"The sentence heretofore imposed on Wallace de Ortega Maxey by this court, otherwise, and in every particular, remains in full force and effect."

Now, Therefore, in Consideration Thereof It Is Ordered that the said reductions of sentences are approved and that the judgments in this cause, as so amended, are hereby affirmed.

Entered by order of the Court.

/s/ CARL W. REUSS,
Clerk.

APPENDIX J.

Constitutional Provisions, Statutes, and Rules Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fifth Amendment to the United States Constitution are:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . .; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

3. The provisions of the Sixth Amendment to the United States Constitution are:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

4. The provisions of the Eighth Amendment to the United States Constitution are:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

5. The provisions of the Ninth Amendment to the United States Constiution are:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

6. The provisions of the Tenth Amendment to the United States Constitution are:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

7. The provisions of 18 U.S.C. 1461, as amended (June 25, 1948, c. 645, 62 Stat. 768; June 28, 1955, c. 190, §§ 1, 2, 69 Stat. 183; August 28, 1958, Pub. L. 85-796, §1, 72 Stat. 962), are:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and —

"Every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and

"Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom

any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and

"Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and

"Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing —

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction, thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

"The term 'indecent', as used in this section includes matter of a character tending to incite arson, murder, or assassination."

8. The provisions of 18 U.S.C. 1462, as amended (June 25, 1948, c. 645, 62 Stat. 758; May 27, 1950, c. 214, §1, 64 Stat. 194; August 28, 1958, Pub. L. 85-796, §2, 72 Stat. 962), are:

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce —

"(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

(b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or

(c) any drug, medicine, article, or thing designed, adapted, or intended for preventing conception, or producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

"Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful —

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000, or imprisoned not more than ten years, or both, for each such offense thereafter."

9. The pertinent provisions of Rule 6 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., are:

"Rule 6. The Grand Jury

* * *

"(b) Objections to Grand Jury and to Grand Jurors.

(1) Challenges. The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the grounds that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

(2) Motion to Dismiss. A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment."

* * *

10. The pertinent provisions of Rule 12 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., are:

"Rule 12. Pleadings and Motions before Trial; Defenses and Objections

(a) Pleadings and Motions. Pleadings in criminal proceedings shall be the indictment and the in-

formation, and the pleas of not guilty, guilty and *nolo contendere*. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) The Motion Raising Defenses and Objections. *(1) Defenses and Objections Which May Be Raised.* Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(2) Defenses and Objections Which Must Be Raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) Time of Making Motion. The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

(4) Hearing on Motion. A motion before trial raising defenses or objections shall be determined

before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct."

11. Rule 21 (b) of the Federal Rules of Criminal Procedure provides as follows:

* * * * *

"(b) Offense Committed in Two or More Districts or Divisions. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill or particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

* * * * *

APPENDIX K.

Excerpts From Sex Life of a Cop.

The author states in *Sex Life of a Cop:*

"Sergeant Thorn joined his partner in the prowl car and soon they were patroling the dark deserted streets, Hal driving. Shaking doors and windows and checking the security of the business places in town was about the only minor police work the charming boys in blue cared to do. They had no desire to be energetic for a police department that was so corrupt in their opinions.

"It seemed the poor man paid through the nose and the rich man, or rich gangster, could get away with murder wholesale. If you gave the rich ones a ticket, the chief would tear it up and forget it. So why write tickets?

"If you arrested a poor man who couldn't fight it in the despicable courts, the district-attorney would throw the book at him. He would obtain another conviction to add to his list, and thus make himself look promising to the uninformed public for re-election. If you arrested a gangster or local big-shot the chief would turn him loose and chew the officer's ass out for bringing him in.

"The two officers had found, in the course of their police experience, that justice just didn't exist like everyone thought it did. It was just like meat bought at the grocery store—you bought fairness and justice by the pound. The more money one had the more justice he got. That was the way it was.

"They had seen men go to the penitentiary and county jail for long terms, because they didn't have the money to hire a lawyer to pull a fix or grease

the Judge's palm. The worst part was, the cases could have been beaten legally. But instead, the unfortunates were railroaded, thereby furthering another's evil gain. It wasn't this way just in Dobbsville. It existed all over the country in various parts. It was a well-known but unproven fact among the patrolmen that the Chief, Mayor, D.A., Judge, and the whole damnable bunch, was getting a pay-off, taking the age-old shakedown.

"But work didn't exist in Dobbsville, and a job was a job; so the officers resigned themselves to it. But they damn sure didn't have to break their backs butting their heads against a stone wall. They went by the old proverb, 'If you can't lick them, join them'.

"It wasn't until Jim became a cop that he began to realize how stupid John Public was, and how the wool was pulled over his eyes every day of the year. If old John only knew what his tax money bought. . . ." (pp. 71-72).

* * * * *

"All the way to Potter's residence, Frank Potter explained to the good Samaritan in very incoherent words that he knew he could buy off ALL the city officials plus the whole damn town. But if he got picked up tonight it would get in the newspaper, which he couldn't buy off. And tonight of all nights he couldn't afford it.

"He told briefly how he had a big business deal cooking with a firm that was backed by a large church organization from out of town. And just the slightest hint of scandal hitting the papers would kill it.

"Finally he added, just as they pulled into the driveway of his large beautiful home: 'I'd (hic) much rather pay you (hic) any day as those (hic) crooked goddamn city officials. Goddamn, I'm (hic) getting sick an' tired of keeping those (hic) sons (hic) o'bitches in spendin' money. The (hic) Chief, May'r an' all.'

"Minutes later a cab dropped a happy sergeant in front of the grocery store. He paid his fare hurriedly and walked behind the store to get his police car back in service.

"Starting the motor he let the radio warm up to check back into service. Then he drove back to the heart of town.

"Frank Potter was one hell of a fine fellow. He wished he could stop more people that felt the way he did, because burning a hole in his pocket was a crisp one hundred dollar bill. And in his mind was a dream of a new magnum revolver. Tomorrow he would buy it. And by trading in his old revolver he would have some money left to blow if he took the notion.

"This was one hundred dollar bill the crooked city officials wouldn't see, which was sure a hell of a shame. And he would explain the magnum to his dense partner by telling him that he had bought it on a credit plan." (p. 109).

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"You can satisfy part of the people part of the time but you can't satisfy all the people any time. But to hell with all the fool people, Jim thought. If the people want their kids to be that way and don't want to believe the truth even when you draw them a picture of it then to hell with them all."

"The college professors, the guys who get paid for knowing nothing, said they didn't believe the incident happened even when the kids involved signed confessions for the sheriff admitting they did it." (pp. 114-115).

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"Last week he had spent half his time in court, because a drunk man he and Hal had arrested out at Tresa's Club had tried to sue the city police for violating his civil rights. But all the guy managed to collect was six months in the county jail. To top it all, Tresa was a 'protected' madam, running a very successful whore house.

"Why people believe so entirely in civil rights when they are arrested, just because it's written in the books, was beyond him.

"Police can cover up very easily, — like for instance, holding a prisoner in what they call a hideaway jail, which is illegal as hell. But it works just the same.

"A hideaway jail is a jail like the others, all right. But the prisoner isn't listed on the station books, thus isolating him from all existence. This way the police can say they don't have the man, and hold him indefinitely without a charge. This makes it impossible for the man to have a lawyer or bail or any of his so-called civil rights.

"If the public would just see through this sort of thing, they could put a stop to it. But somehow they don't see through it. They are instead very content with television's glorification of police work." (pp. 115-116).

* * * * *

The book stresses the tensions which come from the incredible monotony and boredom of routine where one man is cooped up with another man day after day, hour after hour, doing routine things over and over.*

> "They were the first car in and Jim intended to be the first man to leave. Another goddamn night over, thank the Lord. And what a night it was. There were no reports to collect from the other cars as there had only been two calls all night, and his car had got them. He had made the reports on them: the kick-in at the market, and the disturbance call at the Kellogg home. That's the way it goes. Every night. Damn." (p. 35).

Part of the tensions of a police officer comes also from manifold fears — "the fear that he will get hurt to the point where he can't go on working, or the fear that he will be killed"; the fear of making "a wrong decision in a crucial moment, a life or death decision"; fear that "he'll show fear to some of his fellow officers". A police officer is "tormented by his fears, and he doesn't dare show them. He knows he's got to present a cool, calm front to the public."**

It is precisely these fears and ambivalent attitudes which are also emphasized in *Sex Life of a Cop*. The two police officers are relieved that they missed the shooting in connection with the robbery of a market (pp. 18-22) because "if we had drove in on that lot sooner, it would have been the end of two damn good police

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*Stern, "What Makes a Policeman Go Wrong," 53 *Journal of Criminal Law, Criminology and Police Science* (1962), 99. See also, Deutsch, *The Trouble With Cops* (1954), 75-95; Brannon, *The Crooked Cops* (1962).

**Stern, *Ibid.*, 99.

officers" (p. 23). There is the constant desire to get through with the "rat race" (p. 27).

Moreover, the book does not condone the conduct of the officers. There is disdain for "the charming boys in blue" (p. 71); there are ironic and amusing, sometimes bitter, scenes of rejection of the officers in their attempted advances (pp. 28-34, 60-67), and finally there is the retribution which comes to Sergeant Thorne in the knowledge that his wife has been unfaithful to him with his own fellow officer (pp. 144-147).

APPENDIX L.

Legal Proceedings Under Federal Obscenity Statutes Prior and Subsequent to 1958 Amendments.

On April 2, 1958, an indictment was returned against petitioner Aday, in the United States District Court for the Southern District of California, Northern Division (Fresno, No. 35-45-N.D. Crim.), charging him with violations of 18 U.S.C. 1461, by depositing for mailing certain alleged obscene books. This indictment was returned shortly before the amendment to 18 U.S.C. 1461, and was therefore brought in the district where the books were allegedly deposited.

The indictment was in four counts. The first count charged the depositing for mailing of the following books: *The Black Night* by Betty Short; *Rene* by Kip Madigan; *Stairways to Sin* by Kip Madigan; *Dark Quarters* by Stella Hampton; *The Rambling Maids* by Betty Short; *Tainted Wife* by Willi Peters and *Violent Surrender* by Cherri Southern. The jury returned a verdict of not guilty on the said first count, the prosecutor submitting only the book *The Rambling Maids* by Betty Short to the jury.

On the second count, the jury was 9-3 for acquittal on the book *The Strange Three* by Louise Sherman, another book *Karla* by Vern Wade having been withdrawn by the prosecutor.

On count three, the jury was 9-3 for acquittal on the book *Turbulent Daughters* by Reese Hayes.

The fourth count involved a book *Taxi Dancers*, but this count was withdrawn from the jury's consideration by the prosecutor.

Thereafter, on February 6, 1959, the Government moved to dismiss counts two and three; the motion was granted, and the indictment finally dismissed therefore as to all counts on the said day by District Judge Yankwich.

Thereafter and despite the warnings by Congress and despite the alleged unofficial policy of the Department of Justice, an indictment in the District of Arizona (U.S.D.C. No. C-15596 Phoenix) was returned against petitioner Aday and other defendants on April 27, 1960, now charging that another alleged "obscene book" had been caused to be deposited in the City of Fresno, State of California, and caused to be delivered by petitioner and other defendants in the District of Arizona, in violation of 18 U.S.C. 1461. The book involved in said indictment was entitled *Sex Life of a Cop* by Oscar Peck.

On or about May 25, 1960, the Department of Justice picked Grand Rapids, Michigan for the return of still another indictment against petitioners, this time charging violations of 18 U.S.C. 1461 and 1462, as amended, involving eight alleged obscene books, one of which, *The Black Night* by Betty Short, had been vindicated in the trial in Fresno, California, and another, *Sex Life of a Cop,* was the very book named in the Arizona indictment as aforesaid.

On October 12, 1960, in Honolulu, Hawaii, petitioner Aday was indicted (U.S.D.C. for the District of Hawaii, Cr. No. 11510; for violation of 18 U.S.C. 1462, as amended, and of the three books there involved, the book *Sex Life of a Cop* was again charged as obscene, even though it was the subject of both the Arizona and Grand Rapids indictments as aforestated.

Only recently, in March 1965, petitioner Aday was again indicted and charged with violations of 18 U.S.C. 1461 and 1462, as amended. This time the indictment was laid in Houston, Texas (U.S.D.C. for the Southern District of Texas, Houston Division, Crim. No. 65-H-80).